APPENDIX.

FELIPE RAMIREZ, by ISIDORO BURGOS, his attorney, *Plaintiff, vs.* THE PANAMA RAILROAD COMPANY, *Defendant.*

Translation of a Certified Copy of the Decision of the Superior Tribunal of Panama, January 28, 1886, and Translation of the Decision of the Supreme Court of Justice of Colombia, at Bogota, March 31, 1887, published in the "*Gaceta Judicial*," Vol. I, p. 170: Year 1, No. 22, Bogota, June 10, 1887.

SUPERIOR COURT OF JUSTICE.
PANAMA, *January 26th, 1886.*

Submitted: The first Civil Judge of this Province pronounced a condemnatory verdict against the Panama Railroad Company on the 28th day of July of the year last past, in the suit against said company instituted by Mr. Felipe Ramirez through his general attorney, Mr. Isidoro Burgos. From this sentence both parties have appealed, wherefore this Superior Tribunal is about to take up the case in order to pronounce a fitting sentence.

(I) The plaintiff in his complaint expresses himself thus: "I formally demand of the Panama Railroad Company the sum of sixty thousand pesos ($60,000) in which sum my principal, according to the instructions I have received from him, estimates the permanent injuries and damages caused him by being thrown from a coach of the Panama Railroad Company by Mr. C. Smith, the conductor of the said coach."

The complaint was allowed to be filed, notice issued, and proceedings followed their legal course until they

reached a stage where the parties could plead in accordance with what was claimed and proved. This was done and the judge pronounced the sentence on the day named, its resolving part being summarized in the three following paragraphs:

A. That the facts on which is based the present complaint of Felipe Ramirez against the Panama Railroad Company for damages and injuries sustained by reason of being thrown violently from a coach of the said company on the 7th day of February of the present year, by the conductor, C. Smith, are proved.

B. That the right of Felipe Ramirez to demand indemnity of the Panama Railroad Company is proved, and

C. That the said Panama Railroad Company is condemned to pay to Felipe Ramirez the damages legally appraised, with costs at the charge of the said company.

(II) That the demanding part of the written pleading, read at the hearing of the 23d of December last past, is as follows: "I only ask that there be cleared up in the sentence one point which may appear doubtful, and which obliges me to appeal from the sentence in order to avoid new and irritating suits with the Panama Railroad Company. I ask that the sum which this company is condemned to pay to my principal be fixed."

From what is quoted in the foregoing paragraph it is clearly seen that the appeal interposed by the plaintiff limits itself to asking that the sum which the railroad company is condemned to pay to Felipe Ramirez be fixed and that he agrees with the other part of the sentence.

The attorney for the railroad company also appeals in his turn, and makes his appeal cover all of points one to three of the resolving part of the sentence which is to be reviewed.

The record having reached the court for that purpose the attorney for the Panama Railroad Company urged a prior and special plea of nullity on account of the disqualification of the attorney of Felipe Ramirez, and for lack of jurisdiction. The first was based on Article 53 of the *Compilacion* of 1880, that among other public employees, soldiers in active service can not act as attorneys on account of their employment—the attorney for Mr. Felipe Ramirez, Mr. Isidoro Burgos, being reputed as such, who at the time was discharging the functions of Judge Advocate, with the rank of Lieutenant Colonel of the National forces quartered in this place.

And the second cause of nullity was based on the lack of jurisdiction in the civil judge before whom the action was presented, filed, and prosecuted until sentence was pronounced. He who urged this objection, as a basis therefore expressed himself thus: "I have alleged nullity for lack of jurisdiction because the controversy, in my opinion, ought to be tried before a commercial jurisdiction or before the National Tribunals."

The legal course being given to the proceedings the Court thought proper to resolve the point on the 9th of September in the following manner:

> *First Point. Disqualification of the plaintiff's attorney.*—"Doctor Burgos is not, therefore, included in the prohibition of Article 53 of the *Compilacion* of 1880."
>
> *Second Point. Lack of jurisdiction.*—"The proceeding urged by the attorney for the company is declared unfounded."

As this second point, although the matter has been resolved and filed in the archives of the Secretary of this Tribunal, is still a matter of discussion in a certain essential part of the brief which the attorney for the company has submitted for final consideration, it will be well to reproduce in this judgment the principal reasons which influence the court in its decision:

Matters of commerce are those which have their origin in a mercantile operation, and the damages and injuries arising out of a criminal act are outside the scope of any contract whatever.

Because a transportation enterprise resembles a mercantile enterprise it should not be deduced that all of its acts are of a commercial nature. The loss of a member or the life of an individual, losses which can not be estimated, are for that reason beyond exact computation, it being necessary to appraise them with regard to various circumstances. None of these circumstances can have the least relation to commercial affairs, but they are directly submitted to the general substantive laws, which proceeding is indicated by the Judicial Code, and the cognizance of which is within the exclusive jurisdiction of the civil judge.

Crimes are never in any case matters of commerce.

Article 1487 of the Judicial Code says:

Civil actions which directly or indirectly grow out of a crime or fault are instituted separately from the criminal action, before judges qualified in civil affairs, according to the requirements of books 1 and 2 of this code.

Indemnity which commercial enterprises have to pay for damages and injuries arising out of crimes has no place in affairs of commerce.

Indemnity growing out of a crime or fault is not, therefore, a commercial matter. Neither is a passenger against whom a crime is committed a person who pertains to the criminal jurisdiction.

III. The incident being concluded, the proceeding followed its regular course until a stage was reached where the final statements of the parties could be heard, which took place at the hearing of the 23d of December last and the 3d of January of the present year. The debate has been maintained with intense interest by both par-

ties. The points of law submitted to this Superior Court have been examined with such searching pertinacity that, by reason of their unusualness, by reason of their connection with the different jurisdictional branches into which the legislation of the Republic is divided, by reason of the confusion to which this has given rise, they have demanded a long and temperate study, as well on account of the unavoidable duty of "giving to each one his right," and because the proper adjudication of the present interests involved will have a more important bearing in the future.

The sum of sixty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, would not compensate, even in a small degree the physical and mental sufferings of the injured party. His misfortune is lamentable, for, though it may not be permanent, as may be deduced from the prognosis of the physician, Dr. Jorge E. Delgado, there are mental sufferings, which though not tangible, yet we can all appreciate, principally when they do not affect us personally.

This action also involves the family of Ramirez, with their feelings and sufferings—but law is justice and it is necessary to so apply it as to give to each one what the law allows.

This is not, however, the first time that an action to recover damages and injuries has been instituted against chartered common carriers in the Republic. The General Transatlantic Company has been the subject of claims of this kind before the tribunals of the extinct State of Bolivar, if not for damages to the person, yet for those to property. The novelty of the claim urged to-day consists in the meaning and application of the legal provisions which it is sought to make effective.

IV. Hence, it is considered (1st) that the principal points which ought to be embodied in this sentence are:

A. The act on which the claim is based. B. If it gives a right to recover damages and injuries, and, C. To whom the charge is imputable. (2d) That these three points are the same that the judge of the first instance set out, and the same from which the parties respectively appealed. (3d) It is a fact, and is proved that Felipe Ramirez has suffered injuries which, as the physicians, Doctors Quijano Wallis, Manuel Antonio Mora, and Jose Maria Lambana state will render him an invalid for life. (4th) That Dr. Jorge E. Delgado, in his prognosis, does not affirm this but says that owing to the age and ill health of the injured person *it is possible* that he will be permanently crippled. (5th) That the injury was caused by C. Smith, and as the manner in which the act took place has so often been referred to, the Court, recurring to what appears in the record in this respect also affirms that Smith committed the offense of which he is accused, which is a crime included in one of the sections of article 2, chapter 3, title 1, book 3 of the Penal Code.

However, it is not thought that Smith should be declared responsible in these proceedings for the criminal act out of which grew the attempt of the 7th of February against the person of Felipe Ramirez, inasmuch as criminal matters have their own special procedure and jurisdiction, which may not be encroached on with impunity. The estimate here made of the act and the responsibility therefor is purely to establish a starting point from which a conclusion may be drawn as to who is responsible for the damages claimed by Mr. Felipe Ramirez through his attorney, Mr. Isidoro Burgos. (6th) The Act on which the claim is based gives the right to recover damages. See article 74 of the Penal Code, which provides as follows:

> Article 74. In every crime from which there may result damages and injuries against the pub-

lic treasury or against individuals, the authors and abettors should be jointly condemned to make good the resulting damages, without prejudice to holding one to a greater responsibility than another, according to their resources and culpability.

Article 76. Id. next herein quoted, covers the case.

> Article 76. In case of wounds or maltreatment which incapacitate one for work, the offended party will recover from those responsible, according to their resources and culpability, the means of subsistence and cure during the resulting illness, whenever the injured party derives the principal subsistence of himself and his family from his personal labor so interrupted.

(7th) The right of Felipe Ramirez is undoubted, clear, and evident, that in the application of the articles just quoted he be declared by the competent authority having jurisdiction of the subject, duly entitled to compensation for the wrongs and injuries resulting to him from the crime which permanently incapacitated him for work.

V. (8th) As the damages and injuries sought to be made good arise from a crime, it is indispensable to take into account the provisions applicable to a criminal act, whose consequences are injurious, in order to determine the right which is claimed.

Speaking generally article 1486 of the Judicial Code provides that a civil action for the recovery of damages for a crime or fault, which ought to conform to the requirements of book 3, can not be instituted until the criminal prosecution is concluded with a condemnatory sentence, and before a judge competent to try a civil suit. The fact which gives Mr. Ramirez the right to claim damages and injuries has to be first tried and decided by the proper authority (the jury) for a crime is

dealt with which merits the penalty of banishment or imprisonment. In this connection it is necessary to distinguish that damages and injuries arising from crimes committed on the property of another, and damages and injuries caused by crimes against persons are being treated of. In the first case the civil action may be instituted even without waiting for the termination of the criminal trial. In the second case it is absolutely necessary to await the termination of the said criminal trial, in order that the sentence pronounced by the judge of criminal jurisdiction, being condemnatory, and in accord with the verdict of the jury, the damages and injuries may be appraised and reclaimed.

Article 1487 corroborates these statements when it says "The other civil actions which directly or indirectly grow out of a crime or fault will be instituted separately from the criminal, etc." What are these other civil actions? Those in which it is not permitted to proceed officially. (That is to say, those which require a private prosecution.—Translator's note.) Those which arise by reason of the damages mentioned in the second sentence of article 1483 of the Judicial Code with reference to those indicated in articles 514 and 519 of the Penal Code, and finally those recently introduced by Article 137 of the *Compilacion* of 1880, which defines the case, or when a crime or fault is committed against property.

VI. (9th) It makes no difference that the act may be notorious, it makes no difference that public opinion recognizes it, it makes no difference that the influence of notoriety, the influence of opinion is felt in the minds of the authorities, it is none the less necessary to submit to the written law. This provides by the 18th clause of article 17 of the Constitution of the extinct State of Panama, in force on the 7th day of February, 1886, that, trial by jury as established by the law, etc., in criminal

matters, "is an individual right, recognized, and guaranteed to every individual of the human race found in our territory." The law has established that in the case of crimes which merit the penalty of banishment or imprisonment there is no right to recover for the damages or injuries inflicted on the person until the guilty ones are ascertained and adjudged responsible for the crimes by competent authority. Indemnity for damages and injuries is a necessary consequence of the sentence so pronounced. The personal responsibility can not be extended to another of whom the offender does not depend. This doctrine is particularized in article 11 of the Penal Code and must be accepted.

> Article 11. The responsibility which carries with it a penalty is purely personal and can never be extended to those who are not culpable.

According to the article it is indispensable that the declaration of culpability be first made by the authority having jurisdiction of the criminal branch, in order to maintain against the culprit an action for the damages and injuries occasioned, and always under the restrictions indicated in article 17, id., the second part of which reads thus: "For the purposes of restitution and indemnity the provisions of chapter 3 of title 3 shall be applied," etc. Article 76, which we have already copied, is included in this title and chapter. It is also found in articles 79 to 81, inclusive, whose doctrine is thus set out: "All matters relating to indemnity for damages and injuries will be tried in a civil action (article 79) and as it is seen that the right to indemnity for damages and injuries ought to be first recognized and determined by a sentence pronounced in a criminal action, in which the party responsible for the crime has been heard and convicted, which has not yet taken place, it is clear and evident that the claim which has been instituted is untimely."

(10th) Article 80 confirms what has been said in this analysis:

> Article 80. If the convict, or the persons who ought to respond for him, have not sufficient goods to pay the whole of the pecuniary "condemnation" the value of what they have will be applied in the following manner. 1st. To repay the value of the food which has been supplied them. (Referring to the first clause of Article 1046—Administrative.) 2d. To the compensation for damages and injuries to those who have suffered them. 3d. To the payment of fines.

As there are no useless words in the law it is necessary to determine the legal signification of the words "convict" (*reo*) and "condemnation" (*condenacion*) which are there used. "*Reo*" (convict) juridically speaking, in criminal law, refers to him only who is or has been condemned, and it could not be otherwise since it is based on the general principles of legislation.

(11th) If one examines book 3 of said code, which treats of the institution and prosecution of criminal trials (criminal procedure) it will be seen that the following gradation, with reference to those responsible for criminal acts, is preserved from the first to the last of its articles: At the preliminary hearing—"accused of crime," "suspected," "held for trial," or other words whose meaning does not encroach on any other phase of the trial. On trial—"presumptive criminal," "indicted," or others of that style until sentence is pronounced. Once sentence is pronounced the prisoner is termed a "convict" (*reo*), and to give more force to the words he is called a sentenced defendant or confirmed criminal.

As is seen the phrase which is used in the article under examination, "to pay the whole of the pecuniary condemnation" could not refer to anything except the goods of one who has been condemned (*condenado*) in the

criminal action; to the goods of the persons who ought to respond for others, in order to pay with their own goods what may be lacking of the goods of the former, so as to make up the total of the pecuniary condemnation.

(12th) The doctrine treated of is confirmed by article 81 which reads thus:

> The pecuniary responsibility growing out of criminal acts executed by minor children, pupils, servants, and in short, by persons who depend upon others, will be made effective out of the private goods of such persons, without the persons from whom they depend being held to a greater responsibility than the civil and subsidiary one in the respective cases and in conformity with law.

Supposing that one of those persons depending on others be condemned in conformity with the law, the pecuniary condemnation must be paid from the goods which he may have, in the order specified in article 80; and if they should fall short of the value of the whole condemnation, then, subsidiarily, that is to say secondarily, in order to make good the deficiency in whole or in part, it will be paid out of the goods of the persons on whom they depend; so that if the goods of the pupil, the minor child, or the servant who has been condemned, etc., suffice only to pay what is specified in the first clause of article 80, then the value of the remainder, specified in the other two clauses will be paid from the goods of those on whom they depend. It is thus demonstrated that it is necessary above everything, that in cases such as the present the condemnatory verdict in the criminal action must first be pronounced, in order that indemnity for damages and injuries may be demanded and made effective out of the goods of the persons on whom depend those who being such dependents of others may be condemned to reparation, etc., and hav-

ing analyzed up to this point the first two points of the sentence appealed from, we now proceed to take up the final and fundamental objective of the question.

VII. To whom is the charge imputable? (13th) It appears that C. Smith, an employee of the Panama Railroad Company, was employed by the said company on the 7th day of February, 1886, to casually lend services as conductor of the train. Before going further it should be established, although it appears to involve a contradiction, that the Panama Railroad is and ought to be considered a chartered public common carrier and as such its obligations are contained in the three chapters of title 5, book 2 of the Code of Commerce. For this reason, and the counsel engaged in the suit having handled the question in the field of commercial jurisprudence, the Court, following the course of the debate, proceeds to quote the provisions of that jurisprudence pertinent to clear up the debated point.

Article 258 of the Code of Commerce defines transportation in this manner:

> Article 258. Transportation is a contract by virtue of which one obliges himself, for a *certain price*, to transport from one place to another, by land, canals, lakes or navigable rivers, *passengers*, or the merchandise of others, and to deliver the same to the person to whom they may be consigned.

Article 262 determines the persons who may celebrate this contract:

> Article 262. Persons who have the capacity to obligate themselves may celebrate this contract.

Article 263 sets out the manner in which the transportation contract may be perfected:

> Article 263. The transportation contract is perfected by the consent alone, express or implied, of the parties.

(14) It is necessary to take into account other provisions of the same title in order to make clear who is responsible for the damages and injuries claimed by the attorney for Felipe Ramirez. Articles 319, 320, and 321, will contribute to this end.

> Article 319. The contract for transportation is understood to determine the conditions of price, time of transit and days of arrival, etc.
>
> Article 320. The tickets for seats or compartments establish the contract *when* they refer to the transportation of persons, etc.
>
> Article 321. The conductors of vehicles or stables, station agents, and the masters of vessels, *may receive passengers* and freight during the journey and obligate the empresarios to comply with the obligations thus imposed on the carrier.

(15) From these legal provisions, which have been established as premises, it is deduced: That the obligations of transportation enterprises emanate from a bilateral contract; that the contract may be celebrated by persons having the legal capacity to obligate themselves; that the contract is perfected by the consent alone, express or implied, of the parties; that the tickets for seats establish the contract when they refer to persons, and that the conductors of vehicles, etc., may celebrate these contracts during the journey.

If therefore all this is true, Conductor C. Smith on the 7th day of February was one of the persons reputed by the law to have the capacity to obligate himself, a person *sui juris*, a person responsible for his actions; a legal person.

VIII. (16th) For the completion of this demonstration we complement it with the fourth clause of article 322 of the Code of Commerce. The article reads thus:

> The empresarios (of transportation) are obliged * * * (4th) to indemnify *passengers* for the damages they may suffer in their persons

through defect of the vehicles; through their fault; through that of the conductors or postillions.

We will complete this demonstration by separating the sentence, as has been suggested in the debate, into the periods which its construction permits. 1st. To indemnify *passengers* for the damages which they may suffer in their persons by reason of the *defects of the vehicle.* 2d. To indemnify *passengers* for the damages which they may suffer in their persons through *their* (the empresarios) *fault.* 3d. To indemnify passengers for the damages they may suffer in their persons *through the fault of the conductors.* 4th. To indemnify *passengers* for the damages which they may suffer through the fault of the *postillions.*

Applying strictly and legally the meaning of the sentences contained in the clause thus divided, we reach the following conclusion: That Ramirez, at the time of the affair with C. Smith could not be considered a passenger. He did not prove that he was such by producing a ticket for a seat or compartment. He could not even prove that he was an employee of the Canal Company with the right to travel on the trains of the Panama Railroad Company. And this being so, and considering Ramirez' insistence Smith might well believe that Ramirez meant to travel without paying his fare, a circumstance which did not invest Ramirez with the character of a passenger nor give him the right to recover under the contract of transportation. The injury to Ramirez of February the 7th, not having occurred through a defect of the vehicles, the empresarios can not be responsible to him by virtue of that part of the law above analyzed. Neither can they be responsible by reason of any fault on their part. The unforeseen and unpremeditated occurrence which took place between Conductor C. Smith and Felipe Ramirez can not give rise to the charge of gross fault,

ordinary fault, or slight fault (*culpa lata, leve o levisima*) against the transportation empresarios. A quarrel, a provocation on the part of a recognized passenger, or any other accidental happening of the moment, growing out of the attack or defense of the train conductor, and the resulting injury or crime, can not be equitably imputed to the fault of the empresarios, for the law does not extend the responsibility for such acts, of themselves personal, to those who are not culpable. See Article 11 of the Penal Code.

> The responsibility which carries with it the imposition of a penalty is purely personal, and is never extended to those who are not culpable.

"Through the fault of the conductors or postillions," the fault which may be attributed shall not be, and ought not to be other than that which results from the defective discharge of their duties, such, for example, as starting before the appointed hour, and at the time when a passenger is about to take the train or car and thereby suffers an injury; the damage inflicted on the persons of passengers by an accident caused by the mishandling of the machinery or carelessness in its use. The occurrence treated of not falling under any of these heads it is deduced that the doctrine of clause No. 4 of article 322 of the Code of Commerce, already analyzed, does not apply to it.

IX. (18th) We now proceed to examine the question in the light of the provisions of the Civil Code and to make clear the doctrine of articles 1547 to 1549 of said code.

> 1547. In order that a person may be obliged to another by an act or declaration of intent, it is necessary first that he be legally capable of obligating himself. The legal capacity of a person consists in his ability to obligate himself by his own act and without the agency or authorization of another.

> 1548. Every person is capable of obligating himself except those whom the law declares incapable.
>
> 1549. Insane persons and those who have not reached the age of puberty are absolutely incapable. Minors who have not attained full legal age, and spendthrifts are also incapable. Besides these there are other special disabilities arising out of the prohibitions which the law imposes respecting certain persons to execute certain acts.

The persons to whom this part of the quoted article refers are those who ought to be under the charge of others, such as minor children who live in the same house with the father or mother; the pupil who lives under the care and guardianship of his tutor or curator, and all those included under the two final paragraphs of the code under consideration. This provision is both wise and clear, its reason being understood:

> Thus the heads of colleges and schools respond for the acts of their scholars while the latter are under their care, and artisans and empresarios respond for the acts of their apprentices and dependents in like case.

Students, as a rule, are under legal age and on arriving at their colleges or schools, under the law and the school or college regulations they remain under the care of the chiefs of such schools or colleges. The apprentices and dependents of artisans and empresarios render these responsible in like case; that is to say, where they are subordinates by reason of the service which they render in a factory, office, or store, where they are under the care and control of the chief of the enterprise.

The doctrine of this article, which is endeavored to be applied to the case of C. Smith, considering him as a dependent of the Panama Railroad Company, and the atter as consequently responsible for his acts, is not ap-

plicable to the case, for if it is true that Smith was an employee of the company it can not for that reason be said that he was one of those persons dependent on another or under the care of another, according to the classes enumerated in the foregoing provisions.

X. (19th) That Smith was capable of obligating himself legally is proved by the fact that he was of full age. The same is proved by his character of conductor of the train of the said 7th day of February, 1886, for, as has been seen, these functions can not be exercised except by those capable of obligating themselves to others. Neither was Smith on the said day an insane person nor a pupil under the guardianship of a tutor or curator. He was an employee of the company but not its dependent. These words "employee" (*empleado*) and dependent" (*dependiente*) are usually treated as synonymous; but the law and jurisprudence differentiate them. Between "*empleado*" and "*dependiente*" there is a great and very palpable difference; the "dependent" of a person, he who is under his guardianship or care, may be employed in the service of that same person; but the "employee" of a person or enterprise can not be his or its dependent. The dependent of one person, under the law, may be the employee of another on whom he does not depend, and in so rendering his services he is not converted into an unemancipated son, nor does he come under the guardianship of his patron or empresario. An employee of the legal status of C. Smith does not bind himself to live under the same roof as his chiefs. The law reputes workmen of this class to be legal persons. A legal person is one in whom the law recognizes the capacity to obligate himself. Not so as to persons dependent on others; those who can not obligate themselves without the assistance of others on whom they depend.

XI. (20th) Now then, and going back a little to those considerations in order to apply the doctrine of article 320 of the Code of Commerce, the Panama Railroad Company can not be held responsible for the act of train conductor C. Smith, and this is explained thus: If the tickets for seats or compartments establish the contract of transportation, when the transportation of persons is referred to, and Ramirez could not prove his right to travel as a passenger in the coaches of the enterprise; and if Ramirez could not prove his right by a ticket for a compartment, as an employee of the Interoceanic Canal Company, it is clear that between C. Smith and Felipe Ramirez, the first the train conductor of the company, the chartered common carrier, that is, the Panama Railroad Company, and the second, Ramirez the contract for transportation had not been perfected, and consequently no obligations had been contracted between the former and the latter. If then there existed no contract between Smith and Ramirez, still less could an obligation have been contracted with a third party by reason of an act not connected with his functions as train conductor, etc.

From what has been set out it is deduced that the criminal act committed by C. Smith is purely a personal one, and C. Smith is responsible for it.

Considering all these things the Court, administering justice in the name of the Republic and by authority of the law, revokes the sentence appealed from and declares the Panama Railroad Company absolved from the charge brought against it by Mr. Felipe Ramirez, through his attorney Mr. Isidoro Burgos, demanding sixty thousand pesos for damages and injuries growing out of the criminal act committed by C. Smith on the person of the plaintiff on the 7th of February, 1886.

Let the resolving part of this sentence be read in public session. Let the parties be notified to attend in the

office of the Secretary, to that end, let it be recorded and returned.

AGUSTIN JOVANE—ENRIQUE LOPEZ ZAPATA—Citizen Magistrate PRESIDENT—

The Citizen Magistrate of the third plaza has declined to sign the foregoing sentence, giving as a reason that in accordance with law 61 of the past year it was an attribute of the Supreme Court of the Republic to pronounce sentence in this matter. Panama, January 31, 1887.

JOSE B. VILLAREAL, *Secretary*.

PRESIDENCY OF THE SUPERIOR COURT OF JUSTICE,
PANAMA, *January 31, 1887*.

Let the Citizen Magistrate of the third plaza be served, in order that he may be immediately notified of this decision, sign the aforesaid sentence, and in case of disobedience be fined twenty pesos, which will be made effective in conformity with article 6 of the *Compilacion* of 1880. Let notice issue.

JOVANE—VILLAREAL, *Secretary*.

I notified the Citizen Magistrate of the third plaza, Mr. Jose Ma. Rodriguez.

RODRIGUEZ.—VILLAREAL, *Secretary*.

The new tribunal being installed I file this matter in the office of His Excellency the Magistrate President, this the 3d day of February, 1887.

JOSE B. VILLAREAL, *Secretary*.

SUPERIOR TRIBUNAL OF THE JUDICIAL DISTRICT.
PANAMA, *February 5th, 1887*.

It pertains to the Supreme Court to take cognizance in the final instance of those actions in which foreigners take part, in conformity with clause 5 of section 2, article 21 of law 61 of 1886, and as the present trial was

pending in the final instance before the extinguished Superior Court of the Department it is ordered: After citation of the parties, and at the cost of those who interposed the appeal let the decree be remitted to the Supreme Court in order to be made effective.

AGUSTIN JOVANE.—ENRIQUE LOPEZ ZAPATA.—B. PORRAS.—M. J. DIEZ.—JOSE MARIA VIVES PICON.—JOSE VILLAREAL, *Secretary.*

I notified Mr. Antonio Ramirez E.

RAMIREZ E.—VILLAREAL, *Secretary.*

I notified Dr. Pablo Arosemena.

AROSEMENA.—VILLAREAL, *Secretary.*

Interlined "los" "V" "de esta manera" "Articulo 258." "El transporte es en." Valid.

A copy. Panama, August 2, 1912.

(Signed) EDWIN CHANDECK, *Secretary.*

An impression of a stamp reading: "Republic of Panama, Province of Panama. Second Circuit Court Judicial Power."

Translation from the "*Gace a Judicial*," Vol. I, p. 170: Year 1, No. 22, Bogota, June 10, 1887.

SUPREME COURT OF JUSTICE,
BOGOTA, *March 31, 1887.*

Submitted: Isidoro Burgos, as attorney of Felipe Ramirez, instituted before the Civil Judge of the Department of Panama, in the extinct State of the same name, an ordinary suit against the Panama Railroad Company for damages and injuries inflicted on the person and interest of the plaintiff, as was alleged, by one of the employees of the enterprise.

The action followed the usual legal course and sentence was pronounced in both instances, and before

notice was given of the sentence pronounced by the Superior Tribunal of that section, that body considered that the cognizance of the matter in the second instance pertained to the Supreme Court of Justice, and for that reason they have sent the record of the proceedings to this appellate court.

Section 9 of law 46 of the present year repealed paragraph 5, section 2 of article 21 of law 61 of 1886; and in consequence the superior tribunals of the districts are the ones that ought to review the sentences of the first instances pronounced by the judges of the circuit, in which the rights and obligations of foreigners are treated of.

Wherefore the Supreme Court of Justice, in accord with the Procurador, abstains from entering a judgment in this matter and orders that the process be returned to the tribunal transmitting it.

Let notice issue; let it be copied and published.

(Signed) R. ANTONIO MARTINEZ.—JOSE N. SAMPLER. JULIAN R. COCK BAYER.—FRANCISCO A. FERNANDEZ.—BENJAMIN NORUEGA.—MANUAL A. SANCLETO.—RAMON GUERRA A., *Secretary*.

On April 1, 1887, I notified the Procurador General of the foregoing decree.

ARRANGO M.—GUERRS, *Secretary*.

On the 2d of April, 1887, I notified Mr. Julian Felix de Leon of the foregoing decree.

DE LEON.—GUERRA A., *Secretary*.

(Translation from the "Judicial Gazette," Vol. VII, No. 353, pages 332–334.)

RUPERTO RESTREPO *vs.* THE SABANA RAILWAY COMPANY (*La Compañia del Ferrocarril de la Sabana*).

SUPREME COURT OF JUSTICE,
BOGOTA, *July 19, 1892.*

Decree: On the 3d day of February, 1890, Ruperto Restrepo filed a complaint in an ordinary suit against the Sabana Railway Company, so that, after hearing the company and its Manager, and after due trial, the company might be condemned to pay to the plaintiff the damages which he alleges he has suffered by reason of the passage of trains through the hacienda "*La Jabonera*", and by reason of the occupation of a zone of land which the company took on which to construct the railway without the consent of Francisco Soto Villamizar, the owner of the hacienda which the plaintiff occupies in his character of lessee.

He estimated the amount of damages at two thousand one hundred pesos (P 2,100) and bases his demand on the following allegations:

"(1) I am the lessee of the hacienda "*La Jabonera*," the property of Mr. Francisco Soto V. and now belonging to his heirs, since the year 1886.

"(2) The railway crosses said hacienda and the tracks occupy an extent of more than 900 meters in length.

"(3) Without the consent of the owner of the hacienda, and without legal expropriation, the Sabana Railway Company took possession of the necessary strip and constructed its tracks.

"(4) This occupation deprives me of the enjoyment of a part of the land held under lease, of an area of three fanegadas more or less, and I estimate the damage at two hundred pesos (P 200).

"(5) The trains in passing through the hacienda have killed or rendered useless the animals whose values I set out below:

"One heifer, killed, whose value was one hundred and twenty pesos ($120).

"Two cows, crippled and rendered useless, whose loss in value was one hundred pesos (P 100).

"Three calves, crippled. Loss in value one hundred and eighty pesos (P 180).

"One thoroughbred bull, damaged and rendered useless for breeding purposes. Loss in value one thousand five hundred pesos (P 1,500)."

The plaintiff adds that the right, cause, or reason of his complaint is that conferred on him by the provisions of chapter 9, title 3, book 4 of the Penal Code and articles 2341 *et seq.* of the Civil Code.

The complaint being allowed to be filed by the First Judge of the Circuit of Bogota, before whom it was presented, that official, the interest which the nation and the Department of Cundinamarca had in the suit being established, ordered the record sent to the Tribunal of this judicial district, which took cognizance thereof, the first instance taking place there by reason of the parties not having reached an agreement in the amicable conference.

After the denial of a motion made by the plaintiff's attorney, that judgment be taken by default against the Manager of the railway company, for not having answered the complaint, the attorney for the said Manager interposed dilatory pleas or demurrers—to the jurisdiction, defect in the party plaintiff, and that of the pendency of another suit—which were declared not proven by the Tribunal, which decision was confirmed by the court.

Before an answer to the complaint was filed the complaint was amended by adding to the damages demanded the sum of seven hundred and eighty-four pesos, fifty centavos (P 784.50), as the value of three head of

cattle killed by the trains of the same railway after the filing of the original complaint and as the value of an account paid to C. L. de Vericel for the cure of one brindle calf (*ternero sardo*), which seems to be the same that was spoken of in the said complaint, and the damage to which was estimated at fifteen hundred pesos (P 1,500).

The additional charge is made up thus:

Value of one heifer, of crossbreed	$300.00
Value of one cow, of crossbreed	300.00
Value of one small bull, crossbreed	120.00
Value of account paid to Vericel	64.50
Total	$784.50

The complaint so amended was served on the Manager and the *Fiscal* of the Tribunal, who replied to it, denying the right claimed by the plaintiff to demand damages, and offering peremptory exceptions of premature complaint or complaint not in due form, *force majeure*, and fortuitous event, which were allowed to be filed.

The case went to trial on the facts, and, the legal formalities being complied with, the instance was concluded by the sentence of August 28th of the year last past, whose final and resolving part is as follows:

> By virtue of what has been established, the Tribunal administering justice in the name of the Republic and by authority of law, resolves: (1) The Sabana Railway is hereby acquitted of the charge made in the complaint relative to the payment of damages growing out of the occupation of the zone of land in the hacienda "*La Jabonera*" without the consent of the owner; (2) The said Railway Company is hereby sentenced to pay to the plaintiff Ruperto Restrepo the sum which in a separate trial the experts may assess as the value of the damages and injuries which he has suffered by reason of the killing and injuring of certain live stock owned by him; (3) The plea of premature complaint or complaint not in due

form is hereby declared proven in part; (4) The same exception of premature complaint or complaint not in due form is hereby declared not proven in part; (5) the exception of *force majeure*, or fortuitous event is declared not proven; (6) No judgment as to costs is rendered.

Let notice issue and let this sentence be published, copied, and certified to the Supreme Court for its opinion should no appeal be taken.

At the time of notification of the sentence an appeal was interposed by the *Fiscal* of the Tribunal as well as by the attorney for the company and the attorney for the plaintiff, and the appeal being granted the record of proceedings was sent to this court, where at the request of the last named, the case was opened for proof, and the proofs solicited by him were produced. The allegations of the parties being heard and the parties cited for sentence, the Court proceeds to pronounce the corresponding sentence, and in furtherance of which it is necessary to make certain statements.

Naturally the question of the jurisdiction of the court was not examined into since the *Procurador* had pronounced on behalf of the Court an opinion favorable to its juridsiction, because the Court had already resolved the point in favor of its competency when it confirmed the resolution of the Tribunal which declared not proven the dilatory plea of want of jurisdiction.

The defendant company having been acquitted of the charge of damages and injuries arising out of the occupation of the zone of land in the hacienda "*La Jabonera*" on which its tracks are laid, the plaintiff far from demonstrating in the second instance that he had any right to bring this charge, and far from proving that the damages amounted to two hundred pesos (P 200) as alleged in the complaint, said nothing more whatever in regard to it, as may be seen in his last allegation—nor in the expert estimates rendered before this court was

any consideration given by the experts to determine its value. This is proof that the reasons assigned by the Tribunal as the basis of the said acquittal are unanswerable, and that the plaintiff himself so considered them. And as a matter of fact the charge referred to being based on the fact that the railway company occupied the said zone without the consent of the owner, this act, as the Tribunal points out, would have constituted an offense according to the provisions of articles 693 and 694 of the Penal Code in effect at the time the occupation took place; but as the responsibility for this *delito* attaches to a juridical entity (*entidad juridica*) which can not be considered criminally responsible, because we can not suppose in such entities a voluntary and malicious violation of the law by which any penalty may be incurred, a violation and malice which could not exist in an artificial person (*ser ficticio*), it is clear that if such responsibility exists it can only be exacted of the representative of such entity; so that in exacting the responsibility, as has been done, of the entity itself, the fundamental principle of criminal law which demands that the delinquent and the person condemned be identical, has been violated. "Furthermore" says the Tribunal, "granting that juridical persons were capable of committing punishable acts and that the Sabana Railway Company might have been punished in the case with which we are occupied, even so the action instituted would not have been properly brought, for article 1501 of the Judicial Code prescribes that if the civil actions and the criminal action are not brought at the same time the civil action can not be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent.

In addition, neither the plaintiff nor his attorney has proved the plaintiff to be a lessee, in which character he instituted the action, and above all they have com-

pletely failed to prove that the value of the damages which constitute this claim amount to the sum of two hundred pesos (P 200) as set out in the complaint.

In regard to the damages caused by the killing and injuring of certain animals by the trains of the railroad the Tribunal considered the company responsible, taking into account that these damages might have existed independently of the *delito* attributed to the company by reason of its occupation of the zone of land without the consent of the owner, since it is evident that though the road was constructed in a legal manner, such damages could have occurred and have occurred, due to the fact that the right of way was not properly fenced off, and that responsibility has been recognized by the Manager of the company, Carlos Tanco, because according to what he has stated on page 17, he was accustomed to make settlements with private persons for the damages caused them by the trains, which settlements were submitted to the Board of Directors for its approval. The Court would have nothing on which to base a contrary opinion, for it rejects the doctrine, as the Tribunal rejected it, that the damages referred to were the work of *force majeure* or fortuitous cause, which the attorney for the company plead as a peremptory exception. The fact that in some cases it is practically impossible to avoid running over animals found on the railway, because it is not possible to stop the train at a given moment, ought not be considered a sufficient reason for declaring the obligation extinguished, for it is certainly possible to avoid such occurrences by segregating the line by means of suitable fences, as the same company has already done on a great part of its line.

However, as has been seen, the sentence of the Tribunal although it declares the responsibility of the company in relation to the damages suffered by the plaintiff by reason of the killing and crippling of some of his animals

could not determine the sum to which such damages amounted, for lack of the necessary legal proof, principally the expert estimate indispensable in these cases. Consequently it was natural that the attorney for the plaintiff should attempt to better the proofs in the second instance, in the sense of fixing the number of animals killed and the number injured or rendered useless, since the assessment of the experts should be limited to the value of the first and the depreciation of the last, by means of the personal knowledge which they might have had of such animals. Nevertheless, no proof was produced in that regard, and not even the ratification of the witnesses Leon Escobedo and Abdon Pineda was secured, whose testimony would have served to prove the value of the damages to the brindle calf spoken of in the complaint, and which testimony the Tribunal rejected on account of the lack of legal ratification of their statements. The other proofs of the first instance were reduced to the declarations of Campo Elias Torre, Carlos Tanco, Ricardo Morales, and Simon de la Torre, which appear on pages 16 to 19 of the record. The first of these witnesses only states that the trains ran over two animals, a cow and a heifer or yearling bull, in passing through "*La Jabonera*," and he knows that they were crippled, but that he can make no statement as to the value of those cattle because it could not be established.

The witness Carlos Tanco says that "he knows that certain animals were crippled by the trains, in the pastures of "*La Jabonera*," that in his opinion the herd of Mr. Restrepo is of very good grade, but he does not know nor can he state the number of animals which were killed or injured."

The witness Ricardo Morales asserts: "That it is true and a fact within his knowledge that the brindle calf owned by Restrepo was rendered useless by the

trains, and also that the cattle owned by Restrepo were killed; "and further down he states that the same trains have killed ten or twelve cattle belonging to Restrepo and that he knows this because he saw part of the cattle which were killed, and by information received from Mr. Restrepo.

The witness Simon de la Torre also says the "He knew the brindle calf; that he did not know all of the cattle belonging to the said gentleman, which were rendered useless, but he remembers having seen two cows rendered completely useless"—adding afterward that he knows, because he saw it, that the trains killed the two cows to which he referred, and that he knows by hearsay that a greater number of cows were killed or rendered useless.

As is seen, only the last of these witnesses alleges having witnessed the fact that the trains killed two cows. The witness Morales only says that he knows that the trains killed ten or twelve cattle and that he saw some of those animals which were killed, which proves that he did not see how they were killed. The statement of this witness is in contradiction to that made by the plaintiff, since as has been seen, in the original complaint a charge was made only for one heifer which was valued at one hundred and twenty pesos (P 120), and in the amended complaint for three more cattle, which are specified thus: One crossbred heifer, one cow, and one small bull. From which it is deduced that if the statement of the plaintiff is true, that of the witness Morales, who speaks of ten or twelve cattle killed, can not be accepted.

It is then clear from every point of view, as the Tribunal observes, that the full and necessary proof of the number of cattle killed by the trains of the railroad was not produced in the first instance, and as, in the second instance no additional proof of this fact was adduced, it

is clear that the Court can not fix any sum whatsoever as the value of the animals killed. The first expert estimate made by Isidoro Gaitan and Agustin A. Jimenez was rejected by the Court because it attempted to fix the value of animals in general through the knowledge which the experts had of those values, when what was needed was to estimate the value of the cattle killed by the trains, and the depreciation by crippling or damaging the others. It was useless to know that these experts estimated a young thoroughbred bull at one thousand pesos, a thoroughbred cow at eleven hundred pesos, a crossbred cow at one hundred and fifty pesos, an ox at one hundred and fifty pesos, a crossbred bull calf at one hundred and twenty pesos, and a donkey at forty pesos; consequently by the order of the twentieth of February last it was decreed that the experts should fix the value of each one of the cattle killed by reason of being struck by the railroad train and the depreciation or amount of damages suffered by the others from the same cause.

The expert Gaitan in his second report states: "That in Serrezuela he was shown by Mr. Ruperto Restrepo a young brindle bull, which he stated to be the same thoroughbred mentioned in the complaint, and which had been struck by a locomotive, and he found that by reason of a blow which he had suffered during his growing age he had not been able to reach complete development in a manner corresponding to his breed and quality and for that reason he (the expert) estimated the damage to the bull at five hundred pesos." And the expert adds; "As the other animals injured by the locomotive no longer exist, according to the statement of Mr. Restrepo, and as no other was shown to me for its respective valuation, and as those killed of which I have no knowledge, have already been valued in my first report, according to their class, taking into account their alleged

breed and quality, I judge that I have complied with my duty, which I hope may accomplish the desired end."

The expert Jimenez, after saying that he went to the hacienda managed by Mr. Restrepo in order to see the animals injured or wounded, in order to comply with what had been ordered, adds: "Mr. Restrepo informed me that all of the animals injured or wounded by the railroad train, with the exception of a young thoroughbred bull which he showed me, had died from the cause stated, for which reason I can not assign to such animals any other value than that which I gave them in my previous report, with reference to their class. In regard to the depreciation of the young bull mentioned I also estimate that at five hundred pesos."

According to the second report there was no estimate of the animals killed, nor could there have been since the experts were not familiar with them; from which it is deduced that neither can the Court formulate any charge against the railroad company for a value not ascertainable.

In regard to the damage or depreciation of the young bull shown to the experts by the plaintiff, it is true that it has been uniformly estimated at five hundred pesos; but the Court must again observe that no proof has been produced that the damage was caused by a train or locomotive of the railroad company since the witnesses Leon Escobedo and Abdon Pineda who affirmed the fact on rendering their declarations before the municipal judge of Madrid, and the ratification of which was solicited before the Tribunal, which ratification had no legal value on account of not being made in accordance with the requirements of article 638 of the Judicial Code, as was pointed out by the Tribunal itself, and they can not be considered by the Court on account of the lack of confirmation of the said ratification. There exists, then, no legal proof that the damage resulting from the

depreciation of the bull, estimated at five hundred pesos, was caused by the trains or locomotives of the railroad, and in this case the Court can not declare that the defendant company is responsible for the damages or its value.

It is true that the payment to Vericel of sixty-four pesos and fifty centavos for the cure of one brindle calf appears to be proved, but as the deponent himself says, on acknowledging his signature and the facts of the payment, he did not see the accident and can not affirm that the trains of the Sabana Railway injured the calf, and if anything is known to him concerning the matter it is through having heard it from interested parties themselves.

From what has been set forth it is easily deduced that the recourse of appeal having been interposed on the part of the plaintiff against the judgment of the first instance, which condemned the defendant company to pay a sum which should be fixed in a separate trial as the value of the damages and injuries growing out of the killing and crippling of certain cattle belonging to the said plaintiff, the latter proposed on interposing the said recourse, as his attorney stated, to fix the value in the second instance, and thus avoid the separate trial with the same object, which should have followed. But there having been produced no legal proof which the Court could use as a basis for condemning the company to pay a certain sum, it is evident that the verdict appealed from could not be amended in the sense of fixing the indicated value; still less could the Court deny the justice of the verdict in so far as it condemned the company to pay the damages which might be ascertained in a legal manner in a separate trial, for it could not ignore the existence of those damages in respect to the killing and injuring of certain of the plaintiff's animals, though up to now it has not been

possible to satisfactorily assess the amount of said damages, and the Court does not believe as the *Procurador* believes that the defendant company ought to be acquitted of all the charges in the complaint, inasmuch as the institution of a new suit has become unnecessary, granting that in this instance it has not been possible to establish that amount on account of the insufficiency of the proofs. The Court believes on the contrary that the right of the plaintiff to indemnity being recognized, he can not be deprived of that right which he has in conformity with article 840 of the Judicial Code of having the value of that indemnity fixed and determined in separate trial, which can not be considered carried out simply by a substantiation of this second instance.

Therefore, the Supreme Court, partly in accord with the opinion of the *Procurador*, administering justice in the name of the Republic and by authority of the law, confirms the sentence appealed from.

Let notice issue, let it be copied, published in the Judicial Gazette, and let the record be returned.

(Signed) LUCIO A. POMBO.—LOUIS M. ISAZA.—JESUS CASAS ROJAS.—MANUEL EZEQUIEL CORRALES.—MARIANO DE JESUS MEDINA.—EMILIO RUIZ BARRETO.—JUAN EVANGELISTA TRUJILLO.—GABRIEL ROSAS, *Secretario*.

CECILIA JARAMILLO DE CANCINO *vs.* THE RAILROAD OF THE NORTH.

CASSATION.

SUPREME COURT OF JUSTICE,
BOGOTA, *December 16, 1897.*

(Translation: Republic of Colombia, "*Judicial Gazette.*" Official Organ of the Supreme Court of Justice, Year XIII; Bogota, August 16, 1899, Nos. 652–653.)

CIVIL BUSINESS—CASSATION.

SUPREME COURT OF JUSTICE,
BOGOTA, *December 16, 1897.*

Decree: In a memorial assigned to the Fourth Judge of the Circuit of Bogota, on the 4th of June, 1895, Cecelia Jaramillo de Cancino, a widow and a resident of this same city, made the following statement:

> I petition that by final judgment pronounced in an ordinary action you condemn Juan Manuel Davila, who is the concessionaire of the enterprise of the Railroad of the North, to pay me for the damages which resulted from the destruction of a house owned by me, and the articles therein contained, which was situated in the municipality of Suba, and was set on fire by sparks which were thrown out by one of the locomotives of the said railroad company.
>
> Mr. Davila is of legal age and a resident like myself of Bogota. The legal foundations of my suit are the pertinent provisions of title 34 of book 4 of the Civil Code, those of law 62 of 1887, and the most general principles of natural equity.
>
> And to institute this action I depend upon the following facts, which are the reason or cause of it:
>
> 1. During the conjugal partnership which existed between the deceased Mr. Manuel Can-

cino R. and myself, I bought by means of Document No. 413, of the 5th of August, 1891, executed in the first notorial office of Bogota, a piece of land, situated in the municipality of Usaquen according to what the deed states, but which was in reality in that of Suba, on which a house had been built, and which was bounded thus: On the east by the road which leads to the bridge of Comun; on the south by the lands of Zoilo Barrangan; on the west by the land of the same Barrangan, and on the north by the *quebrada* called Batan.

2. In this house there were many valuable articles, among them, parlor and bedroom furniture, wearing apparel, bed clothing, books, tables, and cooking utensils, and many other things, all of which will be determined and valued in the course of the suit.

3. The house was set on fire on the 16th day of June, 1893, and it and all the articles therein contained were completely destroyed.

4. The fire was produced by sparks which one of the locomotives of the Railroad of the North threw out.

5. The house and articles destroyed were worth more than three thousand pesos.

6. The defendant, Davila, is the owner of the enterprise of the Railroad of the North, of which he is concessionaire.

7. Mr. Davila or his agents did not provide adequate measures to prevent the fire; on the contrary the fire was caused by their negligence or want of care.

8. The defendant has not indemnified me for the damages which the fire caused me.

9. The house burnt was near the public road, and through this the line of the Railroad of the North passes; and

10. In addition to my property many others have been set on fire by this same railroad, or more properly speaking, by its locomotives.

> I present the deed in which is set out the acquisiton of the property to which I have referred, and a copy of the schedule of the property (*hijuela*) which was assigned to me in the estate of my deceased husband, Manuel Cancino R. I add then to the things enumerated, the following:
>
> 1. There was adjudicated to me in the estate of my husband the claim to which the said fire has given rise.

This complaint was accompanied by a duly recorded copy of the deed of purchase referred to in the first paragraph of the things enumerated, as well as by the schedule of the adjudication of property made to the plaintiff in the succession of her husband, Manuel Cancino R., in which figures a claim against the Railroad Company of the North for damages caused by the burning of a house in the municipality of Usaquen, with all that was in it. This schedule of inherited property (*hijuela*), has also the corresponding notation of registry.

The judge allowed the complaint to be filed and ordered that the corresponding service thereof be made on the defendant, and that the parties be cited for a friendly conference, which was had, without favorable result. Dr. Julian H. Restrepo, being admitted as attorney for the defendant was served with the corresponding transcript of the complaint (*recibio en traslado la demanda*) and answered, saying:

> I deny the existence of such damages; I deny their supposed cause; I deny that any house whatever belonging to the plaintiff has been destroyed; I deny that any house of the plaintiff has been burnt, that it was done by sparks thrown out by any locomotive of the Railroad of the North; I deny that the plaintiff was the proprietress of any house whatever situated in the municipality of Suba; I deny that the plaintiff was the proprietress of the articles to which the complaint alludes as contained in the sup-

> posed house, articles whose existence I do not acknowledge; and I deny finally that sparks thrown out by a locomotive of the Railroad of the North set fire to any house whatever with the articles therein contained. In consequence I ask for the discharge (*absolucion*) of the defendant. I deny and do not recognize that in the title 34 of book 4 of the Civil Code; in law 62 of 1887, and in the most general principles of natural equity there are provisions or precepts favorable to the pretensions of the plaintiff, or which are pertinent to be invoked in her favor.

Thereupon he denies all the facts upon which the complaint rests, with the exception of the sixth, for he agrees that General Davila is the owner (*dueño*) of the Railroad of the North, and says he does not acknowledge the law and fact (*hecho y derecho*) on which the complaint depends.

Subsidiarily he urged the following peremptory exceptions:

> Unfounded or premature complaint.
> Lack of cause of action against the defendant.
> Lack of cause of action in favor of the plaintiff.

As the foundation of the first of these exceptions it is said: "If the fire had existed and had been caused by carelessness or neglect, it would be a criminal act (*delito*) and the civil action might be instituted at the same time as the criminal but not before and should be tried before the judge of criminal jurisdiction."

The basis of the second is that "if the fire had existed, and had been caused by the negligence or carelessness of those called in the complaint the agents of General Dávila, the latter would not have to respond, or would not be responsible for the said fault or negligence.

As the foundation of the third, it is alleged, "because the credit adjudicated is not the same claimed by the plaintiff; because the ownership of the articles whose

existence is disputed and which it is said were destroyed, has not been proven; and because document number Eight Hundred and Thirteen (?) which appears in the record is null through uncertainty in the location of the property sold."

The case went to trial upon the facts, and, only the party plaintiff produced the following:

An ocular inspection of the archives of the enterprise of the Railroad of the North, which showed that there was evidence of a communciation which the engineer of the enterprise, on the 20th day of June, 1893, directed to Dr. Antonio Roldan, advising him that two houses on the line of the railroad at kilometer 10 had been burnt the preceding Saturday, one belonging to Bishop Rueda and the other to the widow of Mr. Cancino, and adding "however they were not inhabited and they were burnt before others that were nearer to the railway because they were on a gradient on which the engines have to make steam and therefore throw out more sparks and to a greater distance." There was also found a public instrument executed under date of March 7th, 1893, No. 350, in which it is set forth that Juan Manuel Davila, as concessionaire of the enterprise of the Railroad of the North, conferred upon Dr. Antonio Roldan an ample and general power of attorney for the administration of the enterprise. In many of the documents in the office, which the judge and the witnesses had before them, there was evidence that Dr. Alejo Morales B. was Engineer of the railroad, and that he was such in the month of June, 1893.

Among the declarations received, figures in the first place that of Moteo Cortes, who affirms that he sold to Mrs. Jaramillo de Cancino, during her married life with the deceased Manuel Cancino, a house situated at the point called El Batan, in the jurisdiction of Suba or Usaquen; that after it was sold many and valuable

betterments (*mejoras*) were made in that house so that it acquired a value much greater than it before had; that he saw the house after the betterments were made, and saw that there was in the house much furniture, some of it very fine; that coming from Zipaquira one day in the month of June, 1893, he saw that the house referred to was on fire, and at that very time learned from all those who were present and witnessed it, that the burning of this house and of another adjoining it, which he also saw on fire, had been produced by sparks thrown out by a locomotive of the Railroad of the North; that it is public and notorious, because it has been heard by many persons that the railroad was the "incendiary" of the house of Mrs. Jaramillo as well as that of Bishop Rueda; that the first of these houses was very close to the line of the railroad, and that this line was constructed after the house was already built; that the house as well as all the goods which were in it, was totally destroyed by the fire. (Folios 3 and 4 of folder No. 2.) ("*Cuaderno*" *No. 2.*)

The witnesses Barbara Suarez, Manuel Siaz, Zoilo Arevalo Eleuterio Tobar, and Ricardo Cayativa (pages reverse of 13 to 15) assert uniformly that they saw the burning of the house of Mrs. Jaramillo de Cancino, and that it was produced by sparks that one of the locomotives of the railroad threw out, the second of said witnesses adding that no precautions whatever had been taken to prevent damages to the houses adjacent to the line.

The expert opinion or report which appears on pages 23 to 25, of Timoteo Mora and Nicanor Sánchez Dominguez, who uniformly and in view of the proofs produced, conclude by estimating the house which was burnt at three thousands pesos; the furniture and goods contained in it at one thousand pesos; and the rents

of the house for the period elapsed from the 16th of June, 1893, to the 10th of September, 1895, when they rendered their report, at the rate of fifteen pesos per month, at the sum of four hundred and two pesos, which gives a total of four thousand four hundred and two pesos (P 4,402). This expert opinion was approved by the judge without objection by the parties.

The period of taking testimony (*termino probatorio*) being concluded, the briefs of the parties submitted, and the parties being cited for sentence, this was pronounced by the judge of the first instance the 13th day of February, 1896, which sentence in its dispositive part reads thus:

> For the reasons set out, the court administering justice in the name of the Republic and by authority of the law, resolves:
>
> First. That the peremptory exceptions urged by the defendant are not proven.
>
> Second. Let Juan Manuel Dávila be condemned to pay to Mrs. Cecilia Jaramillo de Cancino the sum of four thousand four hundred and two pesos at which the damages were estimated.
>
> Third. Let the same Mr. Dávila be condemned to pay the costs of the trial which will be taxed by experts.

Against this verdict the attorney for the defendant interposed an appeal, and the appeal being allowed, the record was remitted to the Superior Tribunal of Cundinamarca, where a new ordinary term (*termino probatorio ordinario*) was solicited and obtained, and a further extraordinary probatory term of 120 days for the conduct of certain proceedings in the city of London, which was not obtained.

The proofs produced by the appellant were the following, which the Tribunal enumerates thus:

(*a*) Interrogatories answered by the plaintiff. Of the responses given by her it is only necessary to mention the first and second, in which she confesses that she has not instituted, outside of this, any other judicial action, either civil or criminal, relating to the fire, the origin of the controversy.

(*b*) Certificate of Adriano Tribin, Manager of the Sabana Railroad, as to the condition in which the engine *Santander* was found, which was good, when it was returned to that enterprise on the expiration of the contract of lease which Davila entered into with the Sabana Railroad in July, 1892.

(*c*) Copy of decree of the second judge of this circuit in which it is recognized that Antonio de Jesús and Manuel José Cancino are the heirs of Manuel Cancinó R., and a certificate of Notary No. 2 of the same Circuit, in which it is said that there is no evidence that in the judicial distribution of the latter's estate any inventories had been adjudicated in the municipality of Usaquen.

(*d*) Copies of the marriage and death certificates of Manuel Cancino R. He married in November, 1889, and died in September, 1892.

(*e*) Declarations of Fernando V. Conde, Arquilino Márquez, José María Cárdenas, José Manuel Pérez, Louis Felipe Quiroga, Basilio Pinzón, Eliza López and Antonio Roldán.

The principal points concerning which the witnesses cited deposed, are these: "1st. That Juan Manuel Dávila was absent from the country on the day of the burning of the house in question; 2d. That the enterprise was intrusted absolutely to Dr. Antonio Roldán, the attorney in fact of Davila; 3d. That the engine or locomotive called *Santander* was the one which on the day of the fire passed in front of the house that was destroyed by the fire; 4th. That this engine was in charge of Tomas Pinzón on that date; 5th. That the latter

was a good employee, a skillful engineer, prudent, of good disposition, gentle and careful in the discharge of his duty; that Juan Manuel Dávila was scrupulous and exacting as to the selection of employees for the enterprise; and 7th, finally, that the engineer, Pinzón, neither ate nor lived in the house of Juan Manuel Dávila."

The time of taking evidence having expired and the legal proceedings of the second instance being concluded, the Tribunal pronounced its sentence, on the 7th day of May of the present year, which sentence ends thus:

> In consequence, administering justice in the name of the Republic and by authority of the law, the verdict appealed from is amended, but solely in so far as it condemned the defendant to pay the costs of the action. In everything else it is confirmed.
>
> The defendant will pay to the plaintiff by way of indemnification, one hundred pesos (P 100). Let it be published, etc.

Being personally notified of this sentence, on the 8th day of May, a recourse of cassation was interposed against it by the attorney of Dávila, by a memorial presented on the 5th of June, in which were alleged as the foundation thereof, the causes indicated by numbers 1 and 2 of article 2 of law 169, of 1896; and by a decree under date of the 7th of the same June the recourse was allowed, and the record was ordered remitted to the court, where it was "distributed "("*repartido*") on the 5th of July last.

The affair being given the proper substantiation an examination of the foundations of the recourse was thereupon begun, since it is permissible for the court so to do, for in it concur all the circumstances which the law demands for its admissibility, to-wit: Being interposed opportunely, and by a proper person, and the

sentence being one of those against which an appeal may be taken.

The recurrent (*recurrente*) after setting out the considerations contained in the sentence appealed from as the foundation of the confirmation of the verdict of the first instance, says in the petition in which he interposes the appeal:

> By your decision, and by the conclusions thereof, you have violated article 2341 of the Civil Code, without its having been proved that General Dávila had committed the crime or the fault, you have condemned him to indemnify.
>
> In so far as you consider the fire as an illicit act and as culpable, the former for violating the right of another, and the latter by reason of General Dávila not having proved his own personal diligence and care, you have violated this same article 2341 as well as article 1604, by having unduly applied it to this case, and by having interpreted it erroneously, falling also into an evident error of fact in affirming that General Dávila had not proved that he used all the diligence and care possible to prevent the fire.
>
> The evidence of your error of fact is manifest. The fire is not an act, it is the physical and necessary result of an act, and as such result can be neither lawful (*licito*) nor unlawful (*ilicito*), but harmless or prejudicial. The act producing the fire, that is the burning, is what may be lawful or unlawful. If the fire was caused by the sparks thrown out in passing by a locomotive, the passing or throwing out of sparks is the act which may be qualified as lawful or unlawful, but to so denominate the material results is to confound the moral with the physical, the right with the cause.

The recurrent then alleges that General Dávila should not have been condemned for the fault of another, for the sole diligence and care which could be exacted of him was the selection of his employees and that of being

severe in discipline, and that there was not only an error of fact but of law as well in holding that General Dávila had not proved that he was diligent and careful in performing the act of another. But admitting for the sake of argument that General Dávila did not give any proof of his care and diligence, he maintains that condemning him for not having produced that proof was a violation of articles 2341, 2347, 1604, 1757, and 63 of the Civil Code, 5th of law 62 of 1887, and 542 and 543 of the Judicial Code.

The Court proceeded to consider whether the violations pointed out exist. Article 2341 reads thus:

> He who has committed an offense or fault which has inflicted damage upon another is under the obligation of indemnification, without prejudice to the principal penalty which the law may impose for the offense or fault.

The recurrent maintains that in order that one may be held to this class of indemnification it is necessary that he shall have committed an offense or fault and that this offense or fault shall have inflicted damage on another; and he adds that if anyone has been damaged, without its appearing that the loss was caused by an offense or fault there is no cause of obligation either legal or moral. Therefore, whoever demands indemnification for damages through an offense or fault, must prove the damage and must prove the offense or fault causing it, and you, having excused the plaintiff from proving the last have violated article 2341 of the Civil Code.

It is certain that this article imposes on the author of an offense or fault which causes damages to another the obligation of indemnifying the latter, without prejudice to the penalty which the law may impose for the offense or fault committed: But this provision (*disposicion*) does not say that the delinquent is the only

one held to the civil indemnity, and on the other hand there are certain conclusive provisions, such as that of article 2347 invoked by the plaintiff, and which has served as the foundation of the sentence appealed from, to condemn General Dávila to the payment of the indemnification demanded; notwithstanding that neither the plaintiff nor the Tribunal have considered him a delinquent. Further, as it is maintained by the recurrent that such provision has been erroneously interpreted by the Tribunal, and that it ought not to serve as the foundations of that condemnation, it becomes indispensable to consider whether it has been well or ill applied.

That provision is the following:

> Article 2347. Every person is responsible not only for his own actions, for the purpose of making good the damage, but for the act of those who may be under his care.
>
> Thus, the father, and failing him the mother, is responsible for the act of the minor children who live in the same house.
>
> Thus the tutor or guardian is responsible for the conduct of the pupil who lives under his protection and care.
>
> Thus the husband is responsible for the conduct of his wife.
>
> Thus the directors of colleges and schools respond for the act of the students while they are under their care, and artisans and empresarios for the act of their apprentices and dependents in like case.
>
> But this responsibility will cease if with the exercise of the authority and care which their respective characters prescribe for and confer on them they could not prevent the act.

The Tribunal, after examining certain arguments of the defendant arising out of the terms in which the complaint is couched, and on which he depends to maintain the exceptions which he opposed to it, con-

cludes by establishing fundamentally that the intentions of the plaintiff according to the complaint itself was not to invoke in her favor the right of proprietress of the house destroyed by fire, but to recover a credit arising out of the fire itself, a credit which was adjudicated to her in the estate of her husband, because the house mentioned was acquired during the Cancino-Jaramillo marital partnership (*sociedad conjugal*); that there is no reason to doubt the identity of the immovable property to which the complaint refers, nor is the objection worthy of notice, that the complaint ought to have been directed against the Railroad Company of the North because it was so set out in the schedule of adjudication—granting that from what this document says it may not be deduced that this consideration is outweighed by the responsibility with which the plaintiff charges Juan Manuel Dávila—this last issue having been the subject matter of the present suit.

These antecedents being determined the Tribunal, referring to the proof adduced, establishes the following: That the sparks thrown out by one of the locomotives of the Railroad of the North were what caused the fire for the results of which the empresario is responsible, that the greater portion of the points of fact indicated by the complaint are proven. Therefore the Tribunal forthwith proceeds to consider the point of law, reduced to ascertaining if the concessionaire of the enterprise of the Railroad of the North is responsible civilly for the damages caused by the fire. Hence the study and application of the provisions of articles 2341 and 2347 of the Civil Code, the violation of which has been alleged by the defendant and which is now the subject matter of the Court's examination.

It is evident that the provision of the last of these articles assigns the responsibility not only for a person's own acts but for the acts of another when these are

executed by persons who are in the care or under the authority of others, in order that the latter may be responsible for the damages which the former may have caused to a third person, with the limitation and exception, however, that the responsibility of such persons ceases if by the exercise of the authority and care which their respective characters prescribe for and confer upon them they could not have prevented the act.

The Tribunal in applying this disposition to the case of the suit, establishes the responsibility of the defendant as empresario of the Railroad of the North under whose authority the engineer of the locomotive which caused the fire was serving; and applying the rule contained in article 1604 of the Civil Code, that "the proof of the diligence or care is incumbent on him who ought to have exercised it," the Tribunal deduces that the action having been directed not against the locomotive engineer of the railroad, but against the empresario, there is no necessity of ascertaining if there is a criminal responsibility on the part of the engineer, without for that reason pausing to consider if the civil action could have been instituted without regard to the criminal action even before the existence of law 169 of 1896—because it takes notice of the existence of law 62 of 1887, which reads as follows:

> The empresarios of railroads will be responsible for the damages and injuries which they may cause to persons and property by reason of the services of said roads and which may be imputable to carelessness, neglect, or violation of the police regulations which will be issued by the Government as soon as the present law is promulgated.

In spite of the provisions of this law, it is contended by the attorney for Dávila that the engineer of the railroad company could not be considered as his dependent or subordinate (*dependiente*) but solely as his employee

(*empleado*) and that for that reason he does not have to respond for the act which is being inquired into; but in the opinion of the Tribunal, if it is true that in order that the responsibilty of which the Civil Code treats may exist, there ought at the same time to be a dependence (*dependencia*) between the empresario and the agent of the act, it is no less true that this dependence may be recognized as a matter of law, nor is it necessary that the dependence be absolute; it suffices if the act be executed by reason of the service entrusted to the individual who serves under the empresario, for in all the functions with which he is charged he preserves the character of a dependent (*dependiente*) of the empresario.

Without questioning the correctness of this doctrine of the Tribunal, because the dependence or subordination of one man to another can not be absolute but only relative, it is clear on the other hand that the provisions of article 5 of law 62 of 1877, above quoted, without in any way mentioning the dependents, employees, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the services of the said roads.

For the rest, it is perfectly shown in the record that the house destroyed by fire already existed at the side of the road through which the railway was constructed, a circumstance which it is important for the Court to consider, because undoubtedly the aspect of the case would differ notably if the house had been constructed after the establishment of the railway line; and it was easy to foresee that this house as well as the others destroyed by fire, being thatched with straw, were in imminent danger of this fate from sparks thrown out by the locomotives, and that some diligence and care were indispensable in order to avoid it; and there is

not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient in the opinion of the Court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen; and if it is also taken into account that the record shows that the railroad caused the burning of five houses in a space of less than one kilometer, and this on different dates and at different hours, it must be deduced that not only was there no diligence or care to avoid a repetition of the damage, but that the matter was looked on with a certain amount of indifference; and apropos of this the Tribunal points out that it was not even proved that the locomotive in question was provided with the apparatus known by the name of "spark arrester" (*guarda chispas*), which, though it may not completely prevent the emission of sparks at least diminishes their number and tends to prevent the throwing out of the larger ones.

A notable French expositor in commenting on article 1383 of the Civil Code, which establishes the principle that simple negligence, as a fault (*falta*), imposes the obligation of making good the damage caused by it, asks, "When a person is negligent in the discharge of his interests, in the exercise of his rights, will he be responsible for the damages which may be caused by that negligence?" and he answers, "Yes, if such negligence impairs the right of another (*lesiona un derecho ajeno*) for every person is under the obligation of exercising care that his own actions do not work an injury to the rights of others. We are free to be negligent to our own hurt, but when our negligence harms another or impairs

his rights we are obliged to make good the damage which we have caused him."

And as it has been established in the sentence that in the case under discussion it is unquestionable that the proof of the diligence or care is incumbent upon him who ought to have exercised it, in conformity with article 1604 of the Civil Code already cited—the party recurrent maintains that the application of this article is erroneous, because it refers solely and exclusively to contractual offenses (*culpas contractuales*) and can not refer to cases involving penal offenses (*culpas penales*) or quasi crimes (*quasi delitos*). The Tribunal has already denied this theory expressed in the "*allegato*" of the second instance, affirming that it lacked foundation in law, since the article forms part of the title which treats of "the effect of obligations in general," which indicates that every class of obligations is there alluded to, now those arising out of contracts, now those of quasi-contracts, and now those springing from any other source recognized by the law, such as is the execution of an act which has inflicted injury on another.

The Court holds, as the Tribunal has held, that in conformity with our legislation a distinction can not be made between a so-called contractual offense (*culpa contractual*) and a quasi-criminal offense in order to maintain that it is clear, when the first is treated of, that the proof of diligence and care is incumbent on him who ought to have exercised it; for even if it is maintained, as the recurrent says, that article 1137 of the French Code is not applicable to all kinds of obligations but solely to those derived from contracts, the same can not be said of article 1604 of our Civil Code, which contains a more ample and general rule, limited solely by cases determined by the law or excepted by agreement between the parties. And, as the attorney for the party demandant points out, the cited article of the French

Code is included in title 3 of book 3 which treats of "Contracts or conventional obligations in general," while our article No. 1604 forms part of title 12 of book 4 of the Civil Code, a title which establishes the effect of all obligations, not alone those which are derived from contracts, since article 1494, the first of book 4 (above referred to), begins by enumerating the sources from which those obligations arise, and one of these is an act which has inflicted injury or damage on another person, which has nothing of the contractual. And if in conformity with articles 2341 and 2347 of our Civil Code, which have been examined, it is undeniable that there are obligations which arise from quasi crimes, whether one's own or those of persons for whom one is bound to respond, it is necessary to admit that, in accordance with article 1604 of the same code, the persons to whom the responsibility is imputed for his own negligence or that of his subordinates ought to prove his care and diligence.

And even supposing that it could be admitted that article 1604 refers solely to offenses growing out of contracts, it would be from every point indefensible that it should pertain to the plaintiff to prove the fault of the defendant rather than that the latter should be the one to prove care and diligence, as is claimed by the recurrent—for such a doctrine can have no foundation either in law or in any principle of jurisprudence.

From what has been resolved up to this point the Court deduces that there has been no violation or erroneous interpretation of the legal provisions which have been cited, nor of article 1757 of the Civil Code nor of articles 542 and 543 of the Judicial Code, which the recurrent also alleges—because there could have been no violation of these articles since the enactment of article 1604 of special and preeminent application, which establishes the principle that the proof of the diligence and care

which the defendant should have exercised is to be furnished by him, rather that this should fall to the part of the plaintiff. On the other hand it must not be lost sight of that there certainly is in the record, as has been pointed out, proof of the carelessness or civil fault of the defendant himself.

In regard to the violation of article 5 of law 62 of 1887, which has also been alleged, the Court has already examined it and has found correct the application which has been made of it to this case. However, it will be well to examine the objections which have been made to maintain that its application was incorrect.

It is said that the first part of the article simply means that the empresarios of railways must respond to persons who travel by those roads for damages which they and their belongings may suffer by reason of bad service. But aside from (the fact) that the article makes no such distinction and it is not given to the judge to make a distinction where the law makes none, it is certain that when there arose the necessity for legislation in the matter, by reason of the increase in the number of railroads, and of enacting special regulations concerning the responsibility of the empresarios, there already existed in our Civil Code and Code of Commerce regulations which establish the responsbility of empresarios of transportation enterprises, for damages caused to persons and things in transit by reason of the bad condition of the vehicles. (Art. 2072 of the Civil Code and 322 of the Code of Commerce.)

Consequently the allegation that there was need of legislation on this point can not be accepted, for there existed no void in the law that needed to be filled by the regulation of article No. 5 cited. What the legislator undoubtedly wished was to establish a special rule by virtue of which the empresarios of railroads (not the engineers or dependents) should respond for damages

caused to persons or their property by reason of the service of the railroads themselves, a rule which has come to be complementary to that of article 2347 of the Civil Code.

For the rest the Court cites as a precedent in the matter of responsibility of empresarios of railroads for damages caused to property by reason of the service of the said railroads, the sentence pronounced by the Court in the suit instituted by Ruperto Restrepo against the Manager of the Sabana Railroad Company (*"Compañia de Ferrocarril de Sabana"*) for damages caused him by the passing of trains through the Hacienda *"La Jabonera,"* a sentence which sustained that of the Tribunal of Cundinamarca, by which the said company was condemned to pay the damages demanded. (Sentence of the 19th of July, 1892, *Gaceta Judicial*, No. 353.)

The recurrent also alleges a violation of article 1501 of the Judicial Code, in that the sentence did not sustain his plea that the complaint was filed, as he alleges, before the proper time, arguing that the plaintiff could not properly institute a civil suit without at the same time, or prior thereto, commencing a criminal action. Although the Court has examined the conclusion reached in the sentence appealed from, that there was no need to investigate the criminal responsibility, dealing only with the civil responsibility established by article 5 of law 62 of 1887, and has considered it correct, it is also true that the plaintiff only demanded that the defendant should respond for a fault which, without giving rise to any criminal action gave the injured party the right to pecuniary indemnity. The alleged violation of article 1501 of the Judicial Code is, then, unfounded.

In the allegation (*alegato*) on which the appeal is based, as well as that presented before this court, there also is urged the second cause of cassation which is recognized by article 2 of law 69 of 1896, which is made to

consist in that the Tribunal failed to render judgment concerning one of the exceptions alleged by the defendant, that is to say, concerning the exception of the nullity of a writing, and in that it also failed to render judgment concerning the claims alleged by the litigants, inasmuch as it resolved a point which had not been the subject of the controversy, and failed to resolve that which really was such.

The first of these reasons is unfounded, because it suffices to observe that the judge of the first instance expressly declared that the exceptions alleged by the defendant were not proven, and the judgment of the Tribunal confined itself to confirming the sentence of the judge, amending it only in what refers to the payment of the costs, and besides, in the expositive part of said sentence the following is found on the reverse of sheet 73 ("*Cuaderno*") No. 3, which reads:

> What has been resolved up to this point besides establishing the civil responsibility of the empresario of the Railroad of the North for the damages caused by the fire treated of, makes it evident that the exceptions alleged by the defendant are unfounded.

The second of the reasons advanced in support of this contention is that the debate, according to the petitiatory part of the complaint, discussed whether General Davila ought or ought not to be condemned to pay the plaintiff for the damages which resulted from the destruction of a house belonging to her, and the articles therein contained, and that this being the sole subject of the controversy, the sentence was pronounced in favor of Señora Jaramillo de Cancino on the ground that she was vested with the character of an assignee of a credit against General Dávila in the legal distribution of her husband's estate.

It is true that the plaintiff asked that the defendant be sentenced to pay for the damage caused her by the destruction of a house owned by her, and the articles therein contained; but it is also true that in the fundamental facts of the complaint it is also expressed with all clarity that the house treated of had been acquired during the conjugal partnership of Jaramillo and Manuel Cancino R., and that in the liquidation of this partnership owing to the death of the latter there was adjudicated to the first a credit which existed by reason of the fire since the complaint was accompanied by a recorded copy of the respective adjudication.

It can not then be maintained that the only matter of controversy has been the claim for damages as proprietress of a house which no longer existed, for it is evident that this is not the only character in which the plaintiff has appeared in this suit, since she attached the title which she indicated as the foundation of her right—and her character as assignee of that title has also been a matter of controversy since the first instance, because in the sentence which was there pronounced the exception interposed by the defendant, of lack of cause of action on the part of the plaintiff, was declared to be unfounded, and the Tribunal on examining this point says.

> Now if we take into account that in formulating the petitiatory part of the complaint the statement "that the house referred to was the property of the plaintiff" might well have been omitted (for here we are not dealing with a suit for the revindication of that property, but the right to recover a sum of pesos arising out of its destruction, a right which the plaintiff acquired not as the proprietress of that property, but through the legal adjudication of her husband's estate), it is clear that this simple affirmation can in no manner change the essence of things—a

> maxim which if kept in mind by the defendant would have caused him to perfectly understand the true intention of his opponent.

Consequently the second cause of cassation alleged against the sentence is unfounded, for, as has been seen, it is certainly in consonance with the claims duly alleged by the litigants, it has not resolved points which have not been the subject of the controversy, nor has it failed to resolve any of the points which have been, it has not awarded more than was asked, nor has it failed to render judgment concerning any of the peremptory exceptions.

Finally, in the document presented before this Court there is also alleged the sixth cause of cassation recognized in article 359 of law 105 of 1890, in effect at the time that notice of the complaint was given, since it is alleged that in the personal notification of the complaint it was not set out that the record of proceedings in the secretary's office was at the disposition of the plaintiff (defendant?) as required by article No. 1 of the law cited.

To refute this claim it is sufficient to read the certificate which appears at the foot of page 16 and the beginning of page 17 of "*Cuaderno*" No. 1, which reads:

> On June 12th, 1895, the undersigned secretary of the 4th Circuit of Bogota, through the clerk of the secretary's office, Mr. Roberto Rojas D., notified General Juan M. Davila of the foregoing order and of that dated the sixth of the current year (in which the complaint is allowed to be filed, and which orders that notice and the transcript thereof be given), and for the term of five days the transcript (*translado*) of the complaint referred to in the last-mentioned order was turned over to him, and he signs.
>
> (Signed) JUAN M. DAVILLA,
> ROBERTO ROJAS D.,
> SANTIAGO WOOD,
> *Secretary.*

This certificate is evident proof that the personal no-
fication was made and that the transcript of the com-
aint was given to him for five days, as required by
ticle No. 1 of law 105, in which case there was no neces-
ty for stating that the record in the secretary's office
as at the disposition of the party for the simple reason
at it was delivered to him for the term of the tran-
ript; and if that delivery had not been sufficient it is
ated on the reverse of sheet 19 that on June 19th the
torney for the defendant, Julian Restrepo N., again
ceived the transcript of the proceedings; consequently
e alleged cause of cassation does not exist.

In conclusion, and as the recurrent spoke of errors of
t and law on setting up the first of the causes of cas-
ion, and as the Court has examined at length all of
e points which have been the subject matter of the alle-
tions advanced in support of that and the other causes
cassation, without finding such errors in the sen-
ce appealed from, the Court declares finally that such
ors do not exist, not only because it has found correct
application of the legal provisions on which the sen-
ce is based but also because in the sentence the
ts are found in conformity with the proofs set out in
record, without its having been shown that the
ged error of fact in any way appears in that record.

n virtue of all that has been set forth, the Supreme
rt, administering justice in the name of the Repub-
and by authority of the law, declares that there is no
son for setting aside the sentence of the Superior
bunal of Cundinamarca, dated the 6th day of May
he current year, against which the present recourse
assation was interposed.

he costs are against the party recurrent and will be
raised in conformity with the law.

Let notice issue, let it be copied and inserted in the Judicial Gazette, and let the record be returned.

(Signed) LUIS M. ISAZA.—ABRAHAM FERNANDEZ DE SOTO.—CARMELO ARANGO M.—BALTASAR BOTERO URIBE.—JESUS CASAS ROJAS.—OTONIEL NAVAS.—LUCIO A. POMBO.—ANSELMO SOTO ARANA, *Secretary*.

DISSENTING OPINION OF DOCTOR BOTERO URIBE.

I feel that I am not in accord with the foregoing sentence, for I believe that the sentence appealed from ought to have been set aside. I base this opinion on the following reasons:

Article 5 of law 62 of 1877, "by which certain things are prohibited" in respect to the construction and service of railways is a misfit provision (*disposición dislocada*) like many in the legislation of the country, in consequence of legislative intemperance, or the itching to patch the codes with articles of law suggested in any debate whatever, thus destroying the harmony and congruity of those works which are monuments raised during the centuries. This is an evil which naturally occurs when a change is made from one legislation to another. Without doubt it was believed in that year that the codes of Colombia contained no conclusive provisions which made the empresarios of railroads responsible for the damages caused by reason of the service which they rendered, or by reason of their passage, operation, locomotion, or traffic, and forgetting the special provisions which exist in the said codes concerning the subject, and very particularly those of titles 12 and 34 of book 4 of the Civil Code, which treat, the first of "The effects of obligations," and second "The common responsibility for offenses and faults" (*delitos y culpas*), the legislator drew up article 5 already cited, which tended to introduce more confusion than clarity into the matter. Because this intruded provision refers the judge to title

12, which treats in general of the effects of obligations, in order to determine that the proof of diligence or care (to which by contraposition the cited article 5 alludes) is incumbent on him who ought to have employed it and may refer him also, leading him into error, to title 34 which treats of the responsibility for offenses and faults (a special and subsequent title which regulates a different matter) in order to determine what persons are responsible, when and in what manner, for the acts of those who may be under their charge. This article also seems to require for its validity the issuing on the part of the Government of police regulations whose violations it was desired to provide against in the cases imputable to the empresarios of railways.

But what is notable is that it was desired to include so much in the provisions of the cited article 5 that, through not being properly drawn up, the responsibility of the said empresarios for damages and injuries is limited to those "which are caused to persons or property by reason of the services of the said railroads."

In the case which is being litigated between Cecilia Jaramillo and Juan Manuel Dávila, the subject matter of the cassation, the article cited is not applicable, because it is clear that neither the Railroad of the North nor its empresario were rendering any service whatever to the plaintiff when the loss occurred.

But in the hypothesis—which I do not admit—that the misfit article mentioned is applicable to cases similar to those under discussion, and consequently article 1604 of the Civil Code, which is found in the cited title 12, may also be applicable, which article treats of civil obligations, an article which throws the burden of proof of diligence and care on him who ought to have employed it; then it is not admissible that article 2347 of the same Civil Code be also applied, which article is found in title 34 already cited, which governs the matter of

indemnity to which he is bound who commits an offense or fault, according to the definitions given in articles 1 and 3 of the Penal Code; for this would be to mix provisions which treat of indemnity for damages and injuries caused by civil acts with provisions which treat of indemnity for damages and injuries caused by criminal acts. Such confusion, the result of the extravagant article 5 of law 62 of 1887, is an unqualifiable error of law. And in case—which neither do I admit—that the said article 2347 of the Civil Code is applicable and that it makes Dávila responsible for the acts of others, because the said article provides that every person is responsible not only for his own acts, but for the acts of those who may be under his charge, then the latter part of that provision ought to be taken into account, which says, "But the responsibility of such person shall cease if, by the authority and care which their respective characters prescribe for and confer on them they could not have prevented the act." For it is set out in the record that Dávila was absent for days from Bogota and from the location of his enterprise, in Europe, that he left Antonio Roldán in charge of the railroad, that he (Dávila) was scrupulous in the selection of employees for the railway, that the engineer Pinzón was skillful and careful in the discharge of his duties; and because the engineer in charge of the locomotive *Santander* can not be likened to a minor child, to a pupil, a married woman, a student, or an apprentice, that is to say, a dependent, as subordinated in the handling of his engine as in the case of those mentioned, over whom Dávila could exercise *immediately* (note well this term) *immediately* all the authority and all the care which his respective character of absent empresario prescribed for and conferred on him, "in order to be able to prevent the act." All of which demonstrates the material impossibility in which Dávila found himself of preventing the fire which

is attributed to him, making him responsible for the fault of another.

The error is more apparent in reading in the sentence appealed from the following considerations:

"Now then: In criminal law every infraction defined and punished in the penal law constitutes an offense (*delito*). For this reason articles 1 and 3 of the Penal Code in force say, an offense (*delito*) is the voluntary and malicious violation of the law *by which any punishment is incurred*, and a fault (*culpa*) is a violation of the law, imputable but not malicious and voluntary, *by which any punishment is incurred.*" "Desiring then to know if a particular act constitutes a criminal or quasi-criminal offense (*delito o cuasidelito criminal*) or if it ought to be considered merely as a civil offense or quasi-civil offense (*delito o cuasidelito civil*), what must be ascertained is, whether in addition to possessing the qualities of unlawfulness, volition, and fraud or malice (for the *delito*) and unlawfulness, volition, and simple culpability (for the *cuasidelito*) the said act is defined and punished in the penal law; if that be the case it invariably takes the character of a penal offense or quasi offense or penal fault (*delito o cuasidelito o culpa penal*) as the case may be—a circumstance which prior to the promulgation of law 169 of 1896 prevented a demand for indemnity for the damages, without at least, at the proper time instituting the corresponding criminal action. (Articles 501 of the judicial code and 64 of law 100 of 1892.)

"Now then: That the act under analysis is unlawful can be doubted by no one, for it is clearly seen that the right of another is violated by it; that it was done voluntarily is also unquestionable, if it is kept in mind that it was done by persons who at the time of its execution were in the full possession of their intellectual faculties, and were not compelled by "*force majuere;*" a circumstance which clearly demonstrated its imputability—

and with regard to the question of "*culpable*" it is necessary to remember that, as has been said "*culpa*" (fault) is in many cases equivalent to mere carelessness or negligence.

"Our Civil Code recognizes three classes of "fault" or negligence (*culpa o descuido*), to-wit: "*Culpa grave*" which consists in failing to manage the business of another with that care which even negligent persons, or persons of little prudence are accustomed to use in their own affairs, which is equivalent to fraud or malice (*dolo*): *Culpa leve*, which is the lack of that diligence and care which men ordinarily employ in their own affairs, and *culpa o descuido levisimo*, which is the lack of that painstaking diligence which a judicious man employs in the transaction of his important business. (Article 63 of the Civil Code.)

"But will this quasi offense or fault have a criminal character, or will it be considered merely civil?

"That depends solely, as has been said, on whether our penal law assigns to it any punishment, for in that case it comes within the definition of article 3 of the code, concerning the matter; and of course it may be answered that the act in question has the characteristics of a criminal fault, for even though it was done without intention to injure, yet if it was done through negligence, imprudence, or carelessness, as must be considered the case here, from what has been said above, the Penal Code in force punishes it with a penalty of fine and imprisonment.

"In fact, article 863 of said code says:

> 'Article 863. He who shall set fire to any cleared land, stubble land, or dry pasture, without taking all the precautions which prudence counsels, according to the direction and force of the prevailing winds, the location of the place and the distance which intervenes between it and

buildings, ripe grain, forests, groves, or any other thing capable of being burnt; he who setting off fireworks or discharging firearms without due precautions; *and finally, he who by any method capable of causing a fire, shall cause the same in the things of another* NOT WITH INTENTION, BUT THROUGH NEGLIGENCE, IMPRUDENCE, OR LACK OF PRECAUTIONS, shall suffer an arrest of fifteen days to three months and a fine of twenty-five to five hundred pesos.'

"This penal provision takes in without doubt the case which is being investigated, because it imposes the penalty of fifteen days to three months imprisonment and a fine of twenty-five to five hundred pesos on him who, in general by any method of causing a fire shall cause the same in the things of another, *not with intention but through negligence, imprudence, or lack of precautions*: So that the obligation which it is attempted to make effective has a clearly recognized source in the provision of article 2341 of the Civil Code."

From which it is deduced that the burning of the house of Cecelia Jaramillo is invested with the characteristics of the fault (*culpa*) defined in article 863 of the Penal Code—there being "an imputable but not malicious and involuntary violation of the law by which any penalty is incurred," the locomotive engineer is responsible both for the penalty and for indemnity for damages and injuries, and not Juan Manuel Dávila who was thousands of leagues distant from the place where the affair occurred.

Error after error has occurred in this case, ever since the action was instituted, "The foundation of right of this demand," says the plaintiff in her complaint, "arises out of the pertinent provisions of Title XXXIV of Book IV of the Civil Code, those of law 62 of 1887 and the most general principles of natural equity." Now it has been seen that the title cited treats of indemnity for

damages and injuries by reason of offenses and faults (*delitos y culpas*) defined in the Penal Code, and that the law cited indicates certain cases of indemnity for damages and injuries arising by reason of civil acts so that the origin of the right, cause or reason of the demand was mistaken or misjudged—and as rights of action mutually opposed to each other can not be exercised in the same complaint, according to article 269 of the Judicial Code, both the sentence of the first instance and the sentence of the Tribunal in which it was reviewed have fallen into lamentable confusion.

Even the very technicality of the sentencing Tribunal never used in Colombian codes, throws into relief the contradictions of its judgment both in manner and form. The expressions "*delito, ó cuasidelito civil*" and "*delito ó cuasidelito criminal*" are not acceptable by the bench and bar of the country.

In my opinion what is proved in the proceedings is that by reason of the burning of the house of Cecilia Jaramillo he who is responsible for the damages and injuries is the engineer in charge of the locomotive *Santander*, who is the one who committed the fault defined in the cited article of the Penal Code—but that in conformity with article 64 of law 100 of 1892 it is necessary to institute the civil action and the criminal action at the same time, and if they are not instituted at the same time it is necessary to await a condemnatory verdict in the criminal action in order to be able to institute the civil action. Article 39 of law 169 of 1896, which although pertaining to the law of procedure has a substantive character, is not applicable to this case because that law was not in force when the facts treated of occurred, when the complaint was filed.

I believe it is proper that the empresarios of railroads should make good damages and injuries which may be caused by negligence or carelessness occurring in their

enterprises but taking into account the provisions of titles 12 and 34, book 4, of the Civil Code in order to apply them according to the circumstance of the case in controversy, and always with subjection to the general principle involved by the sentence appealed from—that he who commits an offense or fault is the one truly responsible. As the provisions of the said article 5 and of the titles cited are restrictive and penal they should be applied strictly in the prescribed manner; and as article 2347 of the Civil Code is exceptional, its exceptions ought not to be amplified, because in addition to disturbing the harmony of the said code there is a risk of inflicting an injustice, as I believe has happened in pronouncing the sentence appealed from.

The French legislation, insofar as this principle is concerned, is totally foreign to the present case.

From all of which I am of the opinion that the judgment appealed from contained error of fact and law and ought to have been set aside.

Bogota, the 17th day of December, 1897.

(Signed) BALTAZAR BOTERO URIBE ISAZA.—FERNANDEZ DE SOTO.—ARANGO M.—CASAS ROJAS.—OTONIEL NAVAS.—POMBO.—ANSELMO SOTO ARANO, *Secretary*.

ORDINARY SUIT INSTITUTED BY HARRY COMPTON AGAINST ROSENDO ALVARADO.

(Opinion rendered by Magistrate Señor Fabrega.)

SUPREME COURT OF JUSTICE,
Panama, May 11, 1917.

Submitted: Ulises Noguera, substitute attorney for Harry Compton, instituted before the 4th Judge of the Circuit of Panama on the 29th of May, 1915, the following complaint:

I, Ulises Noguera, in the name of Mr. Harry Compton, whom I represent as special substitute attorney, make complaint against Rosendo Alvarado, so that he may be condemned to pay to my principal, Mr. Harry Compton, after due proceedings in an ordinary civil suit, the sum of $5,000 as an indemnification for damages sustained on account of the injuries inflicted by his fault upon the person of Mr. Harry Compton. And subsidiarily I ask an indemnification as personal damages those that were found by the experts.

I base the complaint upon the facts which are numbered separately as follows:

1st. On the 29th of November of the last year, 1914, between four and five o'clock in the afternoon, Mr. Rosendo Alvarado was driving the automobile belonging to him on Central Avenue of this city marked "Ford," which showed a license from Panama numbered 85 and another one from the Canal Zone numbered 192.

2d. The automobile was going in the direction from the railroad station toward the center of the city, and was going along on the right side of Central Avenue and was going at a speed of not less than 15 miles an hour.

3d. Mr. Harry Compton was leaving the sidewalk to take the tramway to go to his house when Mr. Rosendo

Alvarado, being in front of the store of Justo Arosemena, ran over Mr. Compton with his automobile, which threw Mr. Compton to the ground and dragged him beneath the automobile for about 15 feet.

4th. When Mr. Rosendo Alvarado stopped the automobile Mr. Harry Compton was lying on the ground unconscious, with a fractured arm and a broken foot and he was taken to Ancon Hospital. (Mr. Alvarado declined to take Mr. Compton to the hospital in his automobile.)

5th. Mr. Harry Compton remained in the hospital sick on account of the injuries resulting from the collision, for three months, and during the first week he was unconscious.

6th. Mr. Harry Compton remained lame for life in one foot, on account of the collision of which he was the victim.

7th. Mr. Harry Compton owes to Ancon Hospital $500 for the three months that he remained there sick on account of the collision.

8th. Mr. Harry Compton, for the same reason, has ceased to earn during those three months $300 as the Director which he then was and is to-day of the Panama College and Minister of the church annexed to the said college.

9th. The damages suffered by Mr. Harry Compton, with the lameness for life, is justly valued at $5,000. The legal foundation for the suit will be found in the provisions of Articles 2341, 2343, 2347, 2356, 1494, and 1613 of the Civil Code, and Art. 39 of Law 169 of 1896.

I demand the costs.

Mr. Harry Compton, Mr. Rosendo Alvarado and myself are residents of this district. My power of attorney accompanies this complaint."

The defendant answered the complaint as follows:

"I, Rosendo Alvarado, resident of this city, answer the complaint which has been instituted against me by Mr. Harry Compton through his attorney.

"I do not agree that I am obliged to pay any sum to Mr. Compton as indemnity for the injuries that he may have suffered on account of the collision with the automobile that I was driving along Central Avenue on the 19th of November, 1914, because that occurrence does not make me responsible for any crime or fault, because I did not act maliciously nor negligently or with imprudence, want of care, or any other cause that I could have or should have avoided. I managed my automobile without contravening any laws or regulations, and if Mr. Compton received injuries it was due to his lack of care or prudence.

"In respect to the facts I answer as follows:

"The first statement of fact is true.

"The second statement of fact is not true. I was coming from the center of the city to the station, and was not going at the rate of 15 miles per hour, but at a much less speed.

"The third statement of fact is not true. It was not in front of the store of Don Justo Arosemena where the occurrence took place, but in front of the soda water factory, and it is not true that the automobile dragged Mr. Compton about 15 feet, because I stopped the automobile immediately.

"In respect to the fourth statement of fact, I say I do not know the effect produced on Mr. Compton by the collision which he suffered. The statement that I refused to take Mr. Compton to the hospital is false. The occurrence had hardly taken place when I saw them put him in a coach, and then I went on to take my family to my house, and I went immediately thereafter to the police station to report what had happened.

"I am not informed as to the statements of facts Nos. 5 to 9.

"I deny the applicability of the provisions of law on which the complaint is based.

"Panama, July 19th, 1915.

(Signed) ROSENDO ALVARADO."

Suit was opened to the admission of evidence, and on the fourth day of April, 1916, the Judge rendered final judgment, wherein, after stating the facts as above set forth, the following statement is found:

"After the suit was allowed, the defendant was duly notified thereof, and he answered denying the facts stated in the complaint and the law invoked. The suit was opened for the admission of proof, and both parties submitted the evidence appearing in the record, together with their respective arguments thereon, and the parties having been cited to appear the moment had arrived to render the sentence in the case, and to that end the following is considered:

"The suit instituted by the plaintiff against the defendant consists of the material damages that he alleges have been occasioned to him on account of the collision of which he was the victim, caused by the defendant, and in the pecuniary loss which he states consists in the plaintiff having ceased to receive his salary and other emoluments during the time of his sickness resulting from the collision, and in the expenses incurred by him on account of this same sickness.

"A considerable number of declarations of witnesses have been adduced by the plaintiff to establish his allegations, but proof does not result from them to show anything but the fact that the plaintiff Compton was run into by the defendant Alvarado on the evening of the 29th of November, last. It does not appear from the evidence that as a result of the collision the plaintiff suffered any physical injury, much less the damages which

he claims, because there is no proof tending to establish the fact that Compton had suffered any incapacity on account of the said collision, or that by reason of the same he had ceased to receive the salary and other emoluments which he claimed. What alone is demonstrated, as has been said, is the fact that Compton was the victim of a collision on the evening of the 29th of November of last year and the responsible author of that collision was undoubtedly the defendant, but it has not been proved that by reason of the said collision Compton has suffered the damages which he claims. In fact there is no proof whatever to demonstrate that Compton was incapacitated during the three months, that by reason of the collision he had to be taken to Ancon Hospital, and that he had to remain in that establishment for the time alleged in his complaint, or that he suffered a lameness for life on account of the collision, that is to say, the plaintiff has not proved these essential facts from which necessarily the damages claimed might be deduced. Hence, it appears that the plaintiff has not proven the essential facts of his complaint, and in consequence a judgment for the defendant must follow.

"Therefore, the subscribing judge, administering justice in the name of the Republic, and by authority of law, absolves the defendant from the charges of the complaint, and releases both parties from the payment of costs."

Oscar Teran, the principal attorney of the plaintiff, appealed and brought suit to the Court (Supreme Court) where a new period for the admission of proof was granted, and the time having arrived to render final judgment, we pass to examine the result of the record, in order to determine what may be proper, and in accordance with the following opportune considerations:

Various declarations of witnesses were adduced by the plaintiff to prove that Alvarado was the author of the injury received by Compton; but inasmuch as this is a civil proceeding the confession of a party is sufficient, and this results from the answers to the interrogatories made by Alvarado on the 23d of June, 1916 (pp. 58) in which he admitted the following facts: That on the 29th of November, 1914, between 4.00 and 6.00 of the evening, he ran into Harry Compton on Central Avenue; that he, Alvarado, could not stop the automobile at once which struck the said Compton; that the deponent did not have a license to operate automobiles in Panama, and that he had no license to operate automobiles in the Canal Zone. He never went to the Canal Zone, and, therefore, he had no need of a license there.

The witness A. S. de Souza says that Alvarado's automobile was going at a high speed, but that he could not state the number of miles at which the automobile was traveling; Thomas J. Rogers fixed the velocity of the automobile at 20 miles per hour; Felix B. Lowe says that may be the machine was traveling at the rate of 15 miles an hour as was asked him, although he could not be certain as to the speed of the automobile; and the witness J. R. Frost said that he had always seen Alvarado operate the automobile at an uncommon speed, without having experience in its operation, that on repeated occasions he left his automobile in the streets on account of some accident, and on other occasions he would take the automobile to the garage injured in some way. The questions propounded to this witness showed that there had been a disagreement between him and Victor Manuel Alvarado, brother of Rosendo, on account of the car which belongs to Victor Manuel, the latter having demanded $11 from Frost because of

his having broken the bumper in trying to straighten it. Frost, in his testimony, said that the bumper was in ruins.

According to the testimony of Elizondo Herrera, Compton was President of the college situated in Panama near the government palace, and he was Director of the Methodist Church which is conducted at the same place, and that by reason of those services Compton received a salary, the amount of which was unknown to the witness; and Charles William Port testified that the salary was $125 monthly.

Drs. A. B. Herrick and T. W. Earhart, of Ancon Hospital, stated what follows in respect to the incapacity suffered by Compton: That the said gentleman was treated in the hospital and that he had a serious fracture of the right tibia; open wounds in the head and right leg; fracture of the left clavicle, and internal contusions of the lungs and kidneys; that he remained in the hospital from the 29th day of November, 1914, until the 29th day of January, 1915, and that from that day until the third day of March he was compelled to go to the hospital three times a week, more or less, to be treated as an outside patient; that on the 3d of March he suffered an accessory operation and remained in the hospital to the sixth of the same month; that on the last date he left the hospital; but it was necessary for him to continue receiving medical assistance for a period of three months, more or less; that as a result of the injury Compton was left with a lameness for life, consisting in the lack of certain movements of the right foot; but that he can walk notwithstanding that defect.

The defendant on his part adduced the following evidence: José Santoll testified that at the moment that the automobile was passing at a moderate rate of speed, Compton attempted to cross the sidewalk, and

was unable to, being struck in the legs by the machine, and that Alvarado stopped the car instantly and in that way prevented a more serious accident; and that Compton was left stretched out in the street in front of the automobile.

Mr. Luis E. Lopez said that the automobile was going at a moderate rate; that he knows by hearsay from Doctor Lowe that the one responsible for the collision was Compton, on account of his having attempted to cross the street at the moment at which the car was passing, which was running toward the railroad on the left side; that the witness de Souza arrived at the moment at which Lowe and another individual were putting Compton in a coach, and that in the presence of the witness and of Victor Manuel and Rosendo, Lowe said that Alvarado was not responsible for the collision and he promised to testify in that sense; but Lowe did not come to the office to make his statement.

David Mercado stated that as a mechanic he has handled for considerable time Alvarado's automobile; that he knows that the bumper and the glass of one of the lights were broken in Frost's garage; that he knows that the car did not receive any blow or injury caused by Rosendo Alvarado because the latter always travelled slowly, and he knows this because witness accompanied Alvarado always and he was never required to repair any injury to the car; that for the same reason he knows that Alvarado is competent to manage the car; that a lame man, an American, or an Englishman offered him money to testify against Alvarado, but he declined the proposition.

Roberto Villa says also that a lame white man, English-speaking, went on two occasions to look for David Mercado, and on the second occasion he proposed to him that he testify in his favor and against Rosendo Alvarado.

Alberto B. Abarrio says that in his opinion Alvarado was competent to manage an automobile marked "Ford." On some occasions he has seen him going through the streets, driving slowly, but that he does not know whether he travels at the same rate all the time: and finally there appears the following police information:

"November 29, 1915.

"At 5.30 p. m. there appeared at this station Mr. Rosendo Alvarado, to give notice that while passing with his automobile along Central Avenue the car collided with an American citizen, causing him a wound in the face, and according to the testimony given at this station Antonio Marquez R. and the Señor Rosendo Alvarado the one responsible for the said collision is the American, because he threw himself on the car, something which Mr. Alvarado could not avoid. Said American took a coach and went to Ancon Hospital.

"That no complaint has been made against Mr. Rosendo Alvarado in respect to the excessive speed of his automobile.

"Given in Panama on the third day of the month of July, 1916."

There was brought to the record the proof of the expert appraisal of the damages suffered, and this proof resulted in the following: The expert, Eduardo Navarro, fixed at $100 the expenses of the hospital, the only expenses that he took into account, for the reason that in his judgment there has been no lameness for life, and the plaintiff is again engaged in his profession; the expert, Percival C. Cunhal, after going into many considerations touching the material and moral damages inflicted on Compton and his family fixed the indemnity at $10,000; and the expert Alfonso Preciado, who was named as the third appraiser by the Court, declined to give his verdict because he was not

informed as to the material damages that Compton may have suffered or the expenses incurred by him to effect his cure.

Some declarations of witnesses taken outside of the suit by the defendant, but presented during the term fixed for the admission of proof, were not considered, because they had not been ratified in the suit. Those declarations, far from favoring him, are prejudicial to Alvarado, because those witnesses state that Compton attempted to cross Central Avenue, notwithstanding that Alvarado was sounding the horn and some other persons cried to him that he could not cross. This indicates that Alvarado had sufficient time to put on the brake and check the velocity of the car or stop it, so as to avoid the accident. From the proof presented on the trial it appears that Alvarado is the author of the damage caused to Compton, and there is nothing to raise the presumption that he, Alvarado, intentionally caused the injury, and therefore it would seem that it resulted from the want of care on the part of the one or the other of them, because it is not admissible that Compton intentionally exposed himself to such a danger. The higher the efficiency possessed by a chauffeur, the lesser the danger of a collision, and in a crowded thoroughfare like Central Avenue, in which there is always coming and going coaches and automobiles, tramways, etc., and this especially so on a Sunday, which was the day on which the occurrence took place, pedestrians can not be required to await until the street is completely free before crossing; it is at this time that drivers of automobiles should know perfectly how to manage them and display great care to avoid accidents, and if as occurred in the present case the author of the damage was without a permit from the authorities to drive the car, and in doing so contravened the police rules, the presumption is against him, and it was nec-

essary for him to fully prove that the pedestrian placed himself within reach of the car in a foolhardy manner and that notwithstanding all of the care necessary and sufficient it was impossible to avoid the foolhardy act of the person injured; but this proof is lacking in the record because there only can be found the testimony of Santoll which is not any more than the opinion of the witness that the car could not avoid striking Compton's leg; and the testimony of Lopez which is hearsay as coming from Lowe; and Lowe as not having ratified Lopez's statement.

Although the defendant was absolved in the first instance because the amount of damages was not shown, this proof has not been perfected in the second instance. As a matter of fact, it appears from the evidence of one witness only that Compton received 250 pesos monthly ($125) and hence this point not being duly established, the amount that he failed to earn while he was incapacitated can not be appreciated. It does not appear how much he paid for his treatment in the hospital, nor for the surgical operation that was performed on him, nor the cost of the treatment which he received as an outside patient.

And finally, the indemnity that he should receive on account of the lameness that was left to him for life has not been proven. The assessment of damages by the experts in this case is very deficient, because an assessment made tentatively can not be accepted, and even this proof is incomplete by reason of the fact that the two experts named by the parties were in total disagreement and the other refrained from expressing his judgment. The following results from this situation; the defendant can not be absolved, because it has been proven that damages were sustained, and neither can the defendant be condemned capriciously to the payment of a sum certain. Therefore, it would seem equitable

and legal to remit the parties to another suit in which the only thing to be proven is the amount of damages. Therefore, administering justice in the name of the Repubic, and by virtue of the law, the Supreme Court revokes the sentence of the trial court and condemns Rosendo Alvarado to pay to Harry Compton the sum that may in a separate trial be proven to be the amount of prejudice suffered by him on account of the material damage suffered and by way of ceasing income (*lucro cesante*).

There is no special condemnation in costs in the one or the other instance. Let this be copied, notified, published, and returned (to the lower court).

(Signed) ALFONSO FABREGA,
(Signed) MANUEL A. HERRERA L.
(Signed JUAN LOMBARDI.
(Signed) E. URRUTIA DIAZ.
(Signed) JERARDO ORTEGA, *The Associate Judge.*
(Signed) M. A. GRIMALDA B., *Secretary.*

The foregoing is a translation of the judgment rendered by the Supreme Court of Panama on the 8th day of May, 1917, as the same appears in the Spanish Text in the *Registro Judicial* dated June 6 1917, being Vol. XIV, No. 38, Pages 357 to 360.

OROZCO *vs.* PANAMA ELECTRIC COMPANY.

SUPREME COURT OF JUSTICE,
Panama, October 5, 1918.

Submitted: With special power from Emilia Orozco, Eduardo Chiari instituted an ordinary civil suit against the Panama Electric Company, represented by George Edmund Ford, asking that the said company be condemned to pay the plaintiff the sum of three thousand balboas, or whatever sum that may appear to

be just upon the assessment of the experts, in reparation for the damage that has been caused to her by the death of her son, Eliseo Masa Orozco, which occurred on the 3d of March of the present year, as a result of his having been injured by car No. 29 of the urban tramway belonging to the defendant enterprise, which car was operated by motorman No. 129, José Gómez. And in addition she demanded the costs of suit.

The trial terminated, on first instance, by sentence of June 11th last in which the Second Judge of the Circuit condemned the defendant company to pay to the plaintiff the sum of three thousand balboas as well as the cost and expenses of the suit, which were assessed at three hundred balboas, that being the value of the work done according to law.

Both parties appealed from the sentence. The plaintiff argued that damages in excess of three thousand balboas had been proven, and, notwithstanding that, the inferior tribunal limited the judgment to the sum metioned, basing it on the fact that that was the amount demanded in the complaint. In this instance a new period of proof was allowed, which was utilized by the parties who adduced the proof desired by them, and, arguments thereon having been heard, the case has reached the stage for final decision.

The plaintiff limited her action for damage to the sum of three thousand balboas, adding that she would abide by the amount fixed by the experts. Of course, the latter clause had reference to any sum awarded inferior to that demanded. If the plaintiff had said in the complaint that she asked for damages without stating the amount, or that the damages exceeded a sum certain then she might have asked the inferior tribunal to award the sum found due; but taking the complaint as drawn it is plainly deduced therefrom that she estimated the damages in three thousand balboas, but

that she would be satisfied with less than she asked if the experts considered that amount exaggerated. Let us suppose that the defendant enterprise had acquiesced fully in the law and the facts presented in the complaint. Could the tribunal enter a judgment for more than three thousand balboas? It would seem evident that it could not do so. If it is pretended that the cause of action had been proven on the trial, nevertheless the conclusion would be the same. This question aside, we will enter upon a ful examination of the defenses adduced by the defendant.

The defendant first states that the suit is improperly brought because the motorman is charged with gross imprudence, an act constituting a penal offense under article 569 of the penal code, and consequently the law does not permit the recovery of damages resulting from a criminal offense before the accused has been declared criminally responsible It is convenient to study this preliminary question in view of the provisions relating to that subject contained in chapter I, title I, Book III of the Judicial Code.

A penal action springs from every penal offense against the persons who appear to be responsible, and also the civil action for the restitution of the thing, the reparation of the damage done, and the indemnification for the injuries caused by the penal act. The civil and criminal action may be instituted jointly, and so instituted they should be tried and decided in the same proceeding in which the corresponding criminal procedure shall be observed. The civil action may also be instituted separately. Neither the pardon nor the extinguishment of the penal action prejudices the civil action of the offending party or parties, to demand a restitution of the thing, the reparation of the damage caused, and the indemnity for the injury suffered. Neither does the sentence of acquittal affect the case

unless the acquittal is based on the fact that the damage done resulted from a lawful act executed without any imprudence whatever; that is to say, by mere accident or fortuitous cause, among other things. Neither does the extinction of the civil action carry with it the penal action that arises from the same offense or fault. The absolving sentence in a suit instituted to enforce the civil action is no obstacle to the exercise of the corresponding penal action.

The legal precepts which have been condensed in the preceding exposition demonstrate beyond any rational doubt that the new judicial code is a complete departure from the system adopted by the legislature of Colombia that was in force in the Republic of Panama until the 30th day of September, 1917, according to which the civil action instituted for the reparation of damages could not be commenced separately unless judgment had been previously rendered in the criminal case, and establishes the system by which the injured party is given full liberty to make separate civil demand before or after the penal action has been resolved, or jointly with that action. The court understands that this system is more in accord with legal principles, and, in consequence, the action of the plaintiff Orozco is not improper inasmuch as the law authorizes her to proceed as she has done.

It is also alleged that in conformity with article 54 of the Penal Code, Gómez is the only one responsible for the damages for the injuries resulting from the offense which he committed, and that the tramway enterprise had nothing to do with the affair. This is a question which is intimately connected with the fundamental issues of the litigation, and which we shall examine at the proper time. Now, in order to proceed methodically, it is necessary to ascertain what has been proven on the trial.

Eliseo Masa Orozco, a working man of good habits, who was the only support of his mother, Emilia Orozco, 50 years of age more or less, came to a tom-tom dance about 3 o'clock in the morning, which was taking place in the house of John Hudson in Pueblo Nuevo de las Sabanas, and he remained there until four or half past four, amusing himself as any man of 30 years of age of his class might do. At that hour he took the road toward the city of Panama, arriving at a place in the Sabanas road known as Tumba Muerto. He was run over by car No. 29 of the urban tramway, and injured to such an extent that he died from the wounds and injuries received by him. The motorman saw Masa at a distance of twenty meters more or less, and instead of stopping his car he limited himself to sounding the alarm bell and giving out calls of alarm without using the brakes or putting on a counter current. Masa was so near to the tramway line or on the line (this point has not been clearly established) that the car overtook him and injured him horribly. These, in brief, are the facts fully proven, and it is not necessary to enter in details that would be of no aid.

The defendant contends that the car in question was provided with brakes and necessary apparatus for all emergencies, and if the motorman did not use them, and caused the death of Masa the enterprise is not responsible for the act, directly or indirectly, inasmuch as it had taken all the care and exercised all of the diligence of a good father of family to avoid the occurrence of such an accident. The defendant argues also that Gómez was a model motorman, and that in all of his service record not a single accident, previous to the one involved in the suit, was registered against him. These circumstances have also been duly proven with the exception of the antecedent of the motorman Gómez, in respect to which the proofs are extremely deficient,

and come in a general way from employees of the same defendant enterprise. It was necessary for the defendant to bring certificates of qualification, either from some authority or board authorized to issue them or from private persons or other enterprises by whom Gómez had been previously employed, in order to determine that he was in reality a good motorman, careful and diligent, and that he had never had fatal accidents such as that which occurred to Masa, or of similar gravity.

On the other hand the proof against the defendant shows that the motorman did not exercise due care at the moment of danger, and that the precautions that he took were not and could not be sufficient to avoid the accident which occurred. It was not a common case of a pedestrian who was crossing the line of a tramway within the zone prohibited by the regulations; neither has it been proven that when Masa was seen he was within less than twenty meters distant. Witnesses speak of twenty meters more or less, without fixing exactly the distance, and it is well known how difficult it is to determine precisely the distance in a case such as that now under consideration. The positive fact remains that the motorman Gómez saw Masa on the right-of-way, or very close to it, at a sufficient distance to permit him to stop the car, according to the opinion of the experts who have testified upon this point that he did not even endeavor to stop the car, and that he satisfied himself with giving the alarm without knowing whether the man who was on the line was in condition to leave the track, or if some extraodinary reason prevented him from doing so.

It is proper to bear in mind that the case occurred on the Sabanas road, at a lonely place, where frequently it is necessary to stop the cars because cattle get on the right-of-way, and obstruct the passage of the cars. If

in order to prevent a collision with an animal it is required by the regulations that the cars be stopped with much more reason this should be done with regard to a human being, who, for any circumstance, fails to heed the sound of the bell and the cries of alarm, and remains on the right-of-way. Simple prudence suggests that in such cases the detention of the car is the most secure way of avoiding the accident, and if the motorman does not do so the finding should be that he proceeded with gross imprudence, or, at least, with carelessness and culpable negligence, and in violation of the regulations on the subject of wheeled vehicles.

He, who by action or omission causes damage to another, due to fault or negligence, is obliged to repair the damage done so declares article 1644 of the Civil Code. Commenting on article 1902 of the Civil Code of Spain, which is identical with said article 1644, an author expresses himself as follows: "1. *Juridic foundation of this class of obligations.*—This article establishes the general rule in respect to the imposition of the obligations which arise from fault or negligence. These obligations arising from damage caused by a voluntary action or omission, although executed without criminal intention, and, therefore, he who voluntarily executes the acts, causing or producing the injury, or he who also voluntarily, is guilty of the omission that produced the injuries, is required in the first instance to respond to the charge or to the responsibilities of making reparation—"The provisions of this article define and determine with all clearness the special character of this class of obligations which, while in certain cases owe their origin to a fact, or a positive act, such as springs from quasi-contracts, differ, nevertheless, from them in that these result from a lawful and purely voluntary act carried to completion by him upon whom the obligation is imposed, while in those which we are

now treating their origin is due to an unlawful act or omission although nor penal, and, at times, involuntary and even personal to the one who must respond for them, and as we shall see further along there may be cases in which the acts or omissions that produced the damage are not caused by the persons subject to the obligation, who, for certain reasons, must respond for them because they are imputable to them in a certain manner notwithstanding the fact that they did not cause them.

But the rule established in this article only refers to the responsibility imposed upon the party obligated when the damage which must be repaired has been caused by his own personal acts or omissions, and the said rule rests precisely on the juridic principle that serves as the foundation for the theory of said obligation, which declares that he who causes a damage or injury must repair it.—"However, in order not to fall into error it should be borne in mind that the limits of the precept contained in the said article are much more reduced, inasmuch as the precept does not comprise all the damages that may result on account of fault or negligence."

"If we examine carefully the general theory of fault and negligence we observe, in effect, that in one or the other of said causes there are three kinds or three distinct species, that is to say: "1. That which represents a voluntary action or omission resulting in the noncompliance of an obligation previously constituted; "2. That which produces damage or injury without any previous obligation, and which originates from an unlawful act that has not the characteristics of a crime or minor offense (*delito o falta*); and, "3. That which has its origin in an act that constitutes a crime or minor offense, and produces a civil responsibility as an accessory to the criminal responsibility.

"The first of these three species of fault or negligence is accessory to a principal obligation, the noncompliance of which gives rise to the special theory relating to fault in matters of contract, and the study of this should be made upon the examination of each contract, especially, as we have done here, analyzing then the peculiar effect of said fault in each of them."

"The third of the species cited is accessory also, inasmuch as its existence can not be conceived without the crime or minor offense that produces it. That is to say, inasmuch as the civil responsibility and the obligation which proceeds from the fault can only subsist along with the criminal responsibility, it follows that these cases result as a consequence of a criminal responsibility, and, therefore, their examination and regulation belong to the penal laws.

"In consequence of all this it follows that the only specie of fault or omission or negligence that can or does belong to the present chapter, is the second class; that is to say, the one that produces damages or injuries without the existence of an anterior obligation, and without any contractual antecedent, and that has its origin in a culpable action or omission purely civil; that is to say, one, although unlawful, yet does not contain the element of a crime or minor offense because it is not penalized by law. And even within these limits it is necessary to restrict still further the terms or the subject matter of this article which only refers to the fault and negligence personal to the party obligated, and not to those that result from the act or omisions of persons distinct from him.

"The precept which we are examining is founded on a principle of unquestionable equity, and the rule therein established constitutes a maxim of universal jurisprudence, inasmuch as the fault can not prejudice anyone except its author, and no one should bear its con-

sequence who, against his will and without any cause on his part, is the victim of the fault or suffers the injuries resulting from it. Nevertheless, the juridic reasonings that justifies the rule has given rise to the distinct questions in its application, not only in our own tribunals, but in those of other nations as well whose codes sanction analagous legal provisions, as occurs in those of France, Belgium, and Chili.

"II. *Necessary requisite for the application of this precept and extension of the obligation imposed by it.* Among the questions more frequently arising and that have produced the greatest number of decisions in jurisprudence, regarding the application of this responsibility, we find those that relate to the determination of the damage or injury suffered and the demonstration of the existence of the fault or negligence on the part of the one causing it. These are the two indispensable factors necessary to give rise to the obligation now being examined by us, because without the damage or injury the responsibility, to which the factors relate, can not arise, and although the element of damage may exist it does not require a reparation unless fault or negligence on the part of someone who caused the injury.

"In respect to the determination of damages it is necessary that it be certain, and that it does not result from a compliance with an obligation, or from acts or omissions of the injured party himself; and in respect to the proof of the existence of the fault or negligence, mere indications or inadmissible presumptions are not sufficient proof to establish either of them; but they should be proven in such a manner that no doubt is left in regard to them, and of their correlation with the damage caused, because it is necessary that there should exist between them and the wrong produced the rela-

tion between cause and effect in order that they may constitute the basis of the doctrine.

"The sentences of the Supreme Court establishing this doctrine are numerous. For instance; in a suit instituted by the insurance company entitled 'La Unión y el Fénix' against the Marine Society, Ibarra y Compañía for indemnity for damages and injuries to various buildings and furniture, insured by said company, occasioned by a fire resulting from an explosion which occurred on the ship *'Cabo Michachaco,'* the Tribunal, in resolving the cassation interposed against the judgment which absolved the defendant society, declared definitely, by sentence of June 23, 1900, that the action to obtain reparation of the damage caused by the acts or omissions in which fault or negligence intervenes, requires necessarily the demonstration of one or the other of said causes, because they are the essential foundation of the said action, in accordance with articles 1089, 1093, 1902, 1903 of the Civil Code; and in consequence, it devolves upon the plaintiff to submit proof in conformity with the general principle, relating to proof of the obligation, established by article 1214; and the inadmissible indication that the responsibility should be presumed from the simple existence of the damage and that it devolved upon the defendant to exculpate himself, is not justified. Hence, in order that a suit may prosper in which reparation is demanded in conformity with the article which we are examining, it is indispensible to establish proof not only of the damages but of the fault or negligence that produced it as well.

"Said Tribunal in a sentence of November 13, 1901, declared also that article 1902 referred solely and exclusively to the damages caused by an act or omission not derived from the compliance of an obligation. By

sentence of the 7th of March, following, the doctrine, long recognized in the jurisprudence and expressed in article 1902 of the code, was announced, to the effect that fault or negligence is the source of an obligation when between the fault or negligence and the damage the relation of cause to effect exist, but if the wrong produced does not emanate from acts or omissions of a third party the latter is not obliged to make reparation, although *said acts or omissions are imprudent or unlawful*, and much less so when it appears that the damage had for its immediate cause the imprudence of the injured party himself.

"The same Tribunal in a sentence of December 4, 1903, declared anew that in order to properly determine, in a civil suit, a claim for damages and injuries occasioned not by the noncompliance of an obligation, but by an act or omission, constituting an offense or quasi offense (*delito o causidelito*), it is not sufficient to prove the existence of the damages and injury, but in addition it must be proven that they result from the fraud (*dolo*), fault or negligence of the person to whom they are imputated, and such responsibility does not exist, when, instead of acting with malice or fault that person confines himself to the exercise of a lawful right.

"By sentence of the 16th of said month of December, 1903, the necessity for proving the existence of the damages, the indemnification or reparation for which is demanded, was again announced, and it was then said that this was necessary as a fundamental condition to support the responsibility imposed by articles 1902 and 1903 of the code.

"Subsequently, by sentence of March 2, 1904, the said Tribunal declared that when he, who being the owner of a farm, permits this to deteriorate so that it prejudices the rights of a third party, and fails to correct the condition, or to employ adequate means to

avoid its consequence damaging to another, incurs in the responsibility prescribed in article 1902; and, consequently, when a company having a railroad concession takes over a railroad constructed by another company, and does not correct the vices in the construction of the same and thereby causes damage to the property of a third party, it is obliged to indemnify the said damages, and the company will not be permitted to excuse itself by saying that the works were constructed by another enterprise, because the former, that is the succeeding company, was the one who should at that moment remedy the defects.

"The necessity for proof on the part of the plaintiff of the damages and injuries caused was reaffirmed in a sentence of June 7, 1905, in which the doctrine was announced that while he who causes damage to another by his own acts, or the acts of persons for whom he should respond, when fault or negligence intervened, is obliged to repair the damage and pay indemnity for the injuries caused, it is indispensable to prove damages in order to estimate the claim; and if the Tribunal in view of the proof presented and appreciated, as a whole and separately, declares that the plaintiff has not established the real existence of the damages it necessarily follows that the judgment denying the right to indemnity demanded does not infringe the said article 1902.

"And finally, on the 16th of the said month of June, the same Tribunal again declared that the obligation to repair the damage caused, imposed by the said article, proceeds solely when the damage is the necessary consequence of the act or omission in which fault or negligence has intervened, and not when the damage is solely imputable to the one who suffered it in his person or in his property.

"From what has been stated in the sentences which we have cited we may deduce, as a conclusion, that in

order to give rise to an obligation imposed by the article of which we are now treating, the concurrence of two distinct requisites is necessary; that is to say: 1. That a damage or injury exists which does not result from acts or omissions of the injured party himself, and the existence of which must be duly proven by the one who demands reparation; and 2. That said damages and injuries have been caused by fault or negligence of some person other than the one who suffers the damage.

"The obligation imposed by this article embraces the two particulars or the two terms properly belonging to all indemnification in accordance with article 1106 of the same code. That is to say, the value of the loss suffered and that of the profit or income ceased to be obtained. It has been so resolved by the Tribunals, so often referred to, by sentence of January 15, 1902.

"However, although the proof of the existence of the damage or injury is necessary, in order that it may produce the obligation of indemnification, this may be left to the period of the execution of the sentence for the determination of its amount and extent, and it has so been declared by said Tribunal on the 7th of February, 1905, as we shall see further on." (Comentarios del Cógido Civil español, por don José María Manresa y Navarro, Tomo 12, páginas 599 a 605.)" (Translation: Commentaries of the Spanish Civil Code by don Jose Maria Manresa y Navarro, Volume 12, pp. 599 to 605.)

It has been proven fully in this proceeding, that a wrong exists, and that it did not result from the acts of the injured party Masa, and that said damage was caused by the fault or negligence of the motorman Gómez, and not the deceased Masa Orozco. These proofs established the conclusion that Gómez is personally responsible for the damage caused to Masa and

that he is obligated to repair it, and to pay indemnity for the consequent injuries.

But the suit has not been instituted against Gómez but against the Tramway Company of which he was an employee, and which is being charged with the responsibility in conformity with article 1645 of the Panamanian Civil Code which reads as follows: "The obligation imposed by the anterior article is not only demandable for the acts or omissions of one's self, but for those of the persons for whom one is responsible as well. The father, and in case of his death or incapacity, the mother, is responsible for the injuries caused by their minor children, who live in their company. Tutors are responsible for the damages caused by the minors or incapacitated who are under his authority, and dwell in his company."

"*The owners and directors of establishments or enterprises are equally liable in respect to the injuries caused by their dependents* (dependientes) *in the branch of the service in which they may be employed, and within the scope of their employment.*

"The State is responsible in this connection when it acts through a special agent, but not when the damage has been caused by an official to whom the performing of the act in question properly belongs, in which case the provisions of the preceding article shall be applicable.

"And finally, masters or directors of arts and crafts are responsible in respect to the injuries caused by their pupils or apprentices so long as they remain under their custody.

"The responsibility treated of in this article shall cease when the persons therein mentioned prove that they have employed all of the diligence of a good father of family to prevent the damage."

Taking up the affirmation that the defendant company is responsible for the damage caused by its employee, Gómez, the attorney for the said company says: "Therefore, even if we suppose that the provisions of the said Title XVI, Book IV of the Civil Code are applicable to the case under discussion it would be necessary in order for the company to be responsible that it be shown that the company had employed an incompetent and careless man; because the law, in no case, makes any one responsible for the acts which he could not have foreseen. José Gómez has been employed for many years by the company, and if his competency had not been fully established, as it is, the fact alone of his permanency in the employ would demonstrate his competency, because otherwise the company would have been obliged to discharge him from the service. The fact that the cars are in good condition is not contradicted by the other side, and they could not contradict it because the inspector of vehicles is legally required to examine the cars, and he does not consent that they be used if they do not afford the sufficient guarantee." The attorney for the plaintiff on this point says "In the opinion of Doctor Arias it would seem to be sufficient if the company has provided the cars of the tramway with brakes and (reverse lever), because by doing so the company employs all of the diligence of a good father of family.

"But it seems to me, and I am sure that your honors will concur in my opinion, that that is not the way in which the said duty can be complied with. If that was so, the cars might travel alone, or they might be handled by inexperienced persons without any knowledge respecting the obligations connected with the position, and that is inadmissible. Speaking generally on the theory it might be found also that it is sufficient for owners of automobiles to maintain their cars in a good serviceable

condition with brakes, etc., and that they would never incur in a responsibility for the damages done by the persons charged with their operation when culpable negligence has intervened."

Now that this very important question has been touched upon it is proper to make a comparative study of the matter based on the Civil Code of Colombia, and on the one now in force which was taken in part from the Civil Code of Spain.

Article 2349 of the Colombian Civil Code provides that masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants.

The civil sanction which the quoted article establishes against the masters or patrons is based on the concept that they have the free election of their domestics or servants, and if they employ one who is careless or negligent, of bad habits, or disqualified for the work given him, they must bear the responsibility of the damages occasioned by his bad qualities or incapacity. Therefore, if it should be proven that the master did not have the free absolute election of his servant, but simply a relative one, as occurs in those callings which have been placed under regulations by the competent authorities, then the civil responsibility of the master ceases, because in exercising his choice of a servant he reposes confidence in the administrative authority, who authorizes the individual to follow the calling in question. That occurs in respect to the conductors of

automobiles commonly called "chauffeurs." The Government of Panama and that of the Canal Zone have established regulations for the exercise of the calling of the chauffeurs in such a manner that no one who has not been previously authorized may lawfully perform such duties. And so the owner of an automobile who is in need of a chauffeur requires of the latter, before everything else, that he produce a certificate of his qualification, or *license*, as it is commonly called. When the interested party produces those documents, corresponding to the Canal Zone and the City of Panama the owner of the car then rests in the security that the person who has been authorized, by the competent authorities, to operate automobiles is a person qualified to do so, and that without any fear he may trust his life, that of his family, and that of the pedestrians to the hands of this expert who has merited from the examining boards of the Canal Zone and the District of Panama these testimonials to his ability and to the fact that he is entitled to the confidence that may be reposed in him. Because it should be borne in mind that in addition to the technique and practical knowledge that is required by the said boards, before a license is issued, the applicant is also required to present certificates from two persons who know him to the effect that he has observed good conduct, and that he has no degrading vices.

In the same manner that society reposes confidence in the physician and the pharmacist, authorized by competent authorities to exercise their professions, that they are persons qualified, and that the lives of dear ones may be trusted to them, so that same society has full confidence that the authorities will not issue certificates of competency to disqualified individuals to operate automobiles; and, in consequence, those who possess the certificates may guarantee, without any room for doubt, the proper exercise of so delicate and

dangerous a calling. When this calling is once placed under regulations it is the authorities that issue the certificate of qualification that should respond for any deficiency in the chauffeur, and, therefore, that same authority is disqualified to demand of the proprietor of the car that he pay damages occasioned by a person whom that authority has authorized to operate automobiles.

If the calling were not regulated, and the owner of the automobile could choose freely a servant to operate it, then the civil responsibility for damages caused by the incapacity of the servant would fall upon the owner, because in that case the owner would take the place of the board of examiners of chauffeurs, and he would have to investigate fully the competency of the applicant before admitting him into his service.

But taking conditions as we find them the most that the master must do, and this he does to protect his own interest, is to ascertain the previous conduct of the individual; whether he has served in other places and what has been his deportment; whether he is addicted to drink or not; whether he is honorable, of a calm or violent temperament, and whether he has not had accidents of a serious nature. When the master has done all these things it can be said that he has complied with his duty, and that he has employed all the prudence necessary in order to avoid any accident that might result in damage to a third party; in other words, that he has employed the care of a good father of family, which is what is required by article 2349 of the Civil Code when it speaks of the ordinary care and the competent authority.

There is another case in which a master, probably, would be responsible for the damage done by his chauffeur, and that is, if the car travels at a greater rate of speed than that permitted by the police rules

without the master requiring the chauffeur to moderate the speed; but if to the contrary the automobile was going at a speed less than that permitted when the accident occurred, it is clear that the owner is absolutely without responsibility, because he could not foresee or impede the accident by employing ordinary care and competent authority, and he could not anticipate that the servant would behave under such circumstances in an improper manner, due to the want of the necessary calmness or to inexperience which the Board of Examiners and the competent authorities had attributed to him, and in respect to which the master relied upon him.

The principle announced in article 2349 is the same as that established in article 2347, when it says that every person is responsible not only for his own actions, for the purpose of indemnifying the injured, but for the acts of those who are under his care as well. And so the father, and in absence of the father, the mother is responsible for the acts of his minor children who inhabit the same house with him. And so the tutor or the curator is responsible for the conduct of the ward who lives under his care and dependency. And so the husband is responsible for the conduct of a wife. And so the directors of colleges and schools respond for the acts of their pupils while under their care, and the artisans and empresarios for the acts of their apprentices and their dependents (dependientes) in the same case.

But the responsibility of such persons shall cease if with the authority and care which their respective quality confers upon them and prescribes they should not have been able to prevent the act.

In all of these cases the person charged with the care of another responds for the culpable and injurious acts of the other provided that he might have prevented the damages and did not do so; but if notwithstanding he

has employed the indispensable prudence and care of a good father of family the damage nevertheless is produced, then his responsibility terminates, because it would not be just nor equitable to demand from a person more than he can give within human effort. All legal responsibility has its limit at the point where the unforeseen or inevitable begins.

In the notes of Señor Bello, on the Civil Code of Chili, we find the following: "For example, a coach collides with a person or breaks a window or door, due to the malice or negligence of the coachman. The master could have foreseen the damages that might be caused by a vicious inexperienced coachman, but if a coachman of habitual good conduct should become intoxicated upon one occasion and in that state runs against a pedestrian or insults him, the master not being present, or being present is disobeyed, what can be imputed to the latter?"

Of course, when Señor Bello wrote the Civil Code of Chili automobiles did not exist, and the calling of coachment, or chauffeur, was not then regulated by the police authorities. Nevertheless, accommodating himself to the provisions to be found in the majority of the legislations of civilized countries he limited the responsibility of the master to the case in which he had selected for his servant a person disqualified or of bad conduct, as he well explains it. That being so, it is evident that if the public authorities say to the master, through the medium of a certificate of qualification and good conduct, that he may trust his automobile to Pedro, who has been previously examined and who has given proof before the competent authorities, of his good conduct, the master is not responsible for the damages caused by Pedro because it is presumed that the election that he made was correct, and that he could not foresee that the

qualifications of Pedro would fail on a given occasion, and cause damage to a third person.

An author, who commentated on the precept of the Spanish Civil Code, which is analogous to Article 2349 of our own, announces the following very well considered principles: "Our code has not followed the Italian school, but has been inspired rather in the criterion of the French doctrine inasmuch as it imposes the obligation to repair the damage caused in virtue of a presumption, *juris tantum*, of fault on the part of the person who has under his authority or dependency the one who caused the damage, derived from the fact that he had not employed due care and diligence over the acts of his subordinates to prevent said result. And so it is that, in accordance with the last paragraph of article 1903, said responsibility ceases when it is proven that those who are responsible for the acts of others have employed all the diligence of a good father of family. Therefore the representation is not the cause of the obligation, nor is the interest, nor the necessity that there should be someone responsible for the damage caused by one who was irresponsible and without guarantees of solvency to repair the damage done himself, but it is the compliance, tacit or supposed, with the duties of precaution and prudence imposed by civil ties that unite the obligated party with the persons on whose account he should repair the damage done. For that reason it, the Code, places the obligation among those that come from fault or negligence."

It is, therefore, seen that the criterion of the Spanish Code, as well as that of the Colombian Code, is the one which condemns the want of care of the master in selecting the servant or dependent, or his negligence in not properly overseeing him; but the responsibility of the master disappears if the public authority assumes the duty of choosing the persons competent for certain

callings, and says to the owners of automobiles, for example, that they can not turn over their cars except to those who have certificates of qualification or authorization for the management of those modern vehicles.

The new Civil Code of Panama, approved by the Assembly in 1916, establishes the same principle as that contained in the Spanish Code in its article 1903; and it may be observed that this latter article, as well as the Panamanian article, does not impose on the masters or patrons in general the obligation to pay the damages caused by their domestics or servants as was done in the Colombian Code, and that it limits that responsibility to the owners and directors of an establishment or enterprise in respect to the damages caused by their dependents. And this is so because "it is much more equitable and just that the said responsibility should fall upon the principal or director who could select another dependent, careful and prudent, and not on the injured party, who did not have such a selection, and if the latter utilized the service of the dependent it was solely because of the confidence inspired in him by the said principal or director."

It may not be amiss to add another concept of the above-mentioned commentator on the Civil Code of Spain relative to the responsibility of the owners or directors of enterprises for the damages occasioned by their dependents. He said: "For the same reason he who, on account of his work, profession, or other circumstances, has some other person in his service, or under his dependency or custody (as occurs to owners or directors of an establishment or enterprise in respect to their dependents, and to masters and directors of arts and crafts in relation to their pupils and apprentices) they should require from such person that he discharge his duties with all of the activity and diligence necessary; and if, on account of the person's failure to so discharge

his duties, damages should result, then those who have such persons in their service or under their care should be obliged to indemnify the injured party. Now because he has not shown a proper zeal in the supervision of the acts of his dependents or subordinates, now because the dependents or subordinates, as a general rule, are lacking in the means to make indemnification, it is not just that he who suffers damage on account of another should be deprived of an adequate remedy to demand reparation; the reason of this, though, seemingly hard, is indisputably just, especially in respect to damages caused by the dependents in the various branches of service in which they are employed, and within the scope of their employment."

The Tramway Company of Panama chooses freely all of its employees who render service on the cars, and it is the same company who tries out the employees and declares them qualified for each one of the services required in the management of the vehicles. The authorities have no intervention whatever in the designation or appointment of the employees, nor in their selection nor in the determination of their qualification. Hence, if any one of its employees or dependents turns out to be negligent or careless, and by reason of his fault damage is done to a third party the enterprise is responsible for such damage, because it had full opportunity to select another dependent more careful and diligent. In all of the civilized countries of the world the laws and jurisprudence are especially strict in respect to damages caused by tramways and railroads, bearing in mind the imperative necessity which exists for the services of such means of locomotion, and the impossibility on the part of the passengers to ascertain the qualifications and personal conditions of each one of the employees who serve them. It is necessary to depend on the good faith, care, and diligence of the directors of the respective

enterprises, and only they can save the lives of the pedestrians and passengers from frequent catastrophies.

To sum up, the Court finds that the electric tramway enterprise is civily responsible for the damage caused by the motorman, José Gómez, to Eliseo Masa Orozco, without prejudice to the right of the company to proceed against the same Gómez to recover the sum that the company may have to pay by way of indemnification for the damage done.

In respect to the appraisal of the damages, the expert Ernesto de la Guardia estimated them at 3,600 balboas; the expert Jorge L. Paredes at 1,200 balboas; Claudio Z. Harrison at 1,000 balboas; Rodolfo Castro at 1,200 balboas; Julio Quijano at 3,000 balboas; J. D. Arosemena at 5,000 balboas, including moral damage, and in 2,500 balboas the material damages alone; Eduardo F. de la Guardia at 1,275 balboas; and Enrique de la Ossa at 1,031 balboas the material damages, and in the same sum the moral damages.

The experts, Paredes and Castro, are employees of the defendant enterprise, and the expert, Harrison, is an employee of the attorneys for the enterprise, and, consequently, their findings are lacking in the independence indispensable in such cases.

In view of the diversity of the opinions among the experts, and of the fact, that, in accordance with article 854 of the Judicial Code, the findings of the experts are not of themselves full proof, and that such proof must be appreciated by the Tribunal in rendering final judgment, and taking into consideration the reasons on which the findings of the experts are based, and of the other proofs that appear in the record, the court assesses the indemnity for the injury at the sum of 2,000 balboas, material damages, and in doing this the court has taken into consideration Masa's age (30 years), the age of his mother (50 years), the circumstances that

he was a good son, who divided his salary with his mother, with his children, and with his concubine who lived together in community, that he earned on an average of 30 balboas per month, and that of this he could give his mother 15 balboas per month. Calculating that Emilia Orozco might live eleven or twelve years more the material damage that she suffered from the loss of her son should be estimated in the sum already expressed, inasmuch as there is no other more scientific basis for its ascertainment.

In the complaint nothing is said of injuries on account of moral damages, and in none of the material allegations of the action are moral damages considered. If the plaintiff had desired to submit that question she should have done so in due form, that is to say, state clearly in what amount she estimated the damages for the material injury and in what amount the moral injury.

However, as the attorney for the plaintiff in his argument upon the second instance has insisted upon reparation for the moral damage suffered by the plaintiff, the court has examined the point, and has reached the conclusion that neither the legislation in force up to the 30th of September, 1917, nor that in force at the present time, authorizes the inclusion of the moral damage in the appraisal of the injuries, and also that there is no existing jurisprudence, establishing such a doctrine in the Tribunals of Colombia, nor in those of Spain from whence the civil and penal codes now in force were derived.

The costs were taxed in the first instance in 300 balboas; that is to say, 10 per cent of 3,000 balboas, the amount of the judgment; but inasmuch as in this instance the damages were reduced to 2,000 balboas the corresponding reduction should be made.

In view of the foregoing considerations the Supreme Court, administering justice in the name of the Republic and by authority of law, reforms the sentence brought here for review in the sense of reducing to 2,000 balboas the amount of the damages that the Panama Electric Company shall pay to Emilia Orozco, as well as the costs in the first instance, which are assessed at 200 balboas which the work is lawfully worth. There is no condemnation of costs in this instance.

Let this be notified, copied, and returned.

(Signed) JUAN LOMBARDI,
(Signed) SAMUEL QUINTERO,
(Signed) E. URRUTIA DIAZ,
(Signed) MANUEL A. HERRARA L.,
The Associate Judge.
(Signed) H. F. ALFARO.
The Secretary, (Signed) M. A. GRIMALDO B.

This is a copy, Panama, October 19, 1918.

(Signed) F. GUARDIA, C.,
Secretary of the First Juzgado of the Circuit.

[SEAL]

MR 64853-13

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 203

PANAMA RAILROAD COMPANY,
Plaintiff in Error,

versus

THEODORE BOSSE,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

THEODORE C. HINCKLEY OF
HINCKLEY & GANSON AND
JOSEPH W. BAILEY,
Attorneys for Defendant in Error.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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No

PANAMA RAILROAD COMPANY,
Plaintiff-in-Error,

versus

THEODORE BOSSE,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT-IN-ERROR.

For the reason that the statement of the case appearing in the brief and argument of plaintiff-in-error is so incoherent and rambling that it is a matter of difficulty to understand what same is really about, we desire to preface this brief with a separate statement.

The plaintiff-in-error, a corporation, organized under the laws of the State of New York, was operating a line of motor busses between the town of Balboa and the City

of Panama in the month of July, 1916, and on the afternoon of the 3rd day of that month, one of its motor busses while being driven by the chauffeur in charge, an employe of the plaintiff-in-error, at a rate of speed in excess of twenty miles per hour on a public highway in the town of Balboa, without warning, struck defendant-in-error, and knocked him down, the wheels of same passing over him, crushing his right foot and breaking the bones thereof, causing him such severe injury that he was forthwith removed to Ancon Hospital for treatment. Defendant-in-error was struck by the motor bus on a public highway which at the time was filled with pedestrians, including many women and children. There were no sidewalks on either side of the road.

The following portions of an Executive Order promulgated by the President of the United States under date of February 28, 1912, should be considered in deciding this cause:

> By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:
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> SECTION 1. No automobile, motor cycle, or bicycle shall be driven or operated over the road or streets of the Canal Zone at a speed exceeding fifteen miles (15) an hour on straight roads, or at a speed exceeding eight (8) miles an hour when approaching or traversing curves, forms, or cross-roads, or when traveling over the streets of any city, town, or village of the Canal Zone. The owner of an automobile, if within the car, shall be held responsible for its speed; in the absence of the owner, the person actually driving the automobile shall be held responsible. The person operating a motor cycle or bicycle shall be held responsible for its speed.
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> SECTION 2. In the operation or employment of automobiles, motor cycles, bicycles, carriages, wagons, and other vehicles over Canal Zone roads or streets, the following rules shall be observed,

> viz: All such vehicles, in meeting and passing other vehicles, or in overtaking and passing other vehicles they shall keep to the right. The owner of an automobile or other vehicle, if riding therein, shall be held responsible for the driving or operation thereof, agreeably to the provisions of this section; in the absence of the owner, the person driving or operating such vehicle shall be held responsible. In the case of any motor cycle or bicycle, the person operating same shall be held responsible. * * *

This law had not been repealed and was still in force and effect during the entire month of July, 1916. Defendant-in-error remained in Ancon Hospital from the 3rd day of July, 1916, to the 30th day of that month. As a result of the injuries sustained, he endured extreme pain and suffering, and the second toe of his right foot was amputated while he was in the hospital.

The legal issues as raised by plaintiff-in-error in this case have on three different occasions been decided by five Federal judges, and the Judge of the United States District Court of the Canal Zone, adversely to the contentions as raised by counsel for appellant. This without a dissenting expression.

Panama R. Co. vs. *Bosse,* 239 Fed. 303;
Panama R. Co. vs. *Toppin,* 250 Fed. 989.

Reply to Appellant's Preliminary Statement.

It is rather amusing that counsel for plaintiff-in-error should tender to this Court "some suggestions of a general character relative to the laws of the Canal Zone", which he would try to make believe are applicable and all important in deciding the instant case. However, as these suggestions (pp. 6-14, Appellant's Brief) deal

largely with an historical résumé of the Canal Zone, events with which every member of this Court is familiar, and have absolutely no bearing whatsoever on this case, a cursory reply to same becomes necessary.

It is a fact that the President in 1904 addressed two letters to the Secretary of War of considerable interest to the inhabitants of the Zone, but it is rather drawing on one's imagination to try to make believe that same had the force and effect as law. It is also true that in 1904, a Penal Code and Code of Criminal Procedure were enacted to become law there; rules of Court were from time to time adopted, and in 1907 a modern Code of Civil Procedure was adopted, not to mention hundreds of Executive Orders and Acts of Congress that were from time to time passed affecting the rights of individuals in the Canal Zone. All of these laws were strictly American in character, and the right of trial by jury is now enjoyed there before a Federal court created by an Act of Congress. It is also a fact that the plaintiff in this case is an American Citizen and the defendant an American Corporation.

In 1912, the President by law ordered a depopulation of the entire Canal Zone, and immediately thereafter expropriated all privately owned land, or interest in same in the Zone, thereby making it a Government reservation. At present but few other than those employed by the Government or the Railroad Company are allowed to live there, and all lands or any interest in same are now owned by the Government of the United States or the Panama Railway Company. The population is that of an American Colony consisting of soldiers, sailors and Civilian employees, not one per cent. of whom are Panamanian. It can truly be said the Zone has become Americanized in every respect, especially in its laws and customs, and in no manner should be compared to an Insular possession like the Philippines.

Counsel for plaintiff-in-error would further try to have this Court believe that until May, 1910, the instructions issued by the President were strictly adhered to, and that when the Supreme Court there, in 1910, decided the case of *Kung Chin Chong* vs. *Wing Chong* (p. 15, Brief of Plaintiff-in-Error), the judiciary thereupon started on the downward path and has not since legally righted itself. From a reading of this case as well as that of *Fitzpatrick* vs. *The Panama R. Co.,* cited by appellant (p. 19, Brief of Plaintiff-in-Error), it can plainly be seen that counsel for appellant is mistaken.

It may also truly be said that if one is to apply "The laws of the land with which the inhabitants are familiar", he must not only literally, but strictly, apply the rules of American or common law, as practically all of the inhabitants there now and for several years past have been American, and are entirely guided by American customs and law.

In support of his theory that the laws of the Canal Zone should continue in force until altered or amended by competent authority, plaintiff-in-error, on page 15 of his brief cites the case of *Holden* vs. *Hardy,* 169 U. S. Reports, pp. 366-398, as declaratory of a well recognized principle of International Law.

This was a case in error to the Supreme Court of Utah to review certain judgments of that Court denying an application for discharge upon two writs of *habeas corpus* of one convicted of a misdemeanor for violation of the Utah law regulating hours of employment in underground mines. The syllabus of the case is to the effect that the right of contract may be limited by the state police power—protection of health and morals—state statute limiting hours of labor in mines and making its violation a misdemeanor, is valid. Manifestly this case is not in point.

Reply to Assignments of Error One and Two.

The Doctrine of Respondeat Superior Does Apply in the Canal Zone.

As plaintiff-in-error's second assignment is embodied in the first, they shall be discussed accordingly, or in so far as this brief is concerned as one. In the first assignment, plaintiff-in-error says that the Court of Appeals erred in affirming the judgment of the trial court in overruling the demurrer to the amended complaint in that it thereby held that the liability of the plaintiff-in-error was to be determined in accordance with the common law rules with respect to liability of corporations for the acts of their agents, instead of by rules of the Civil law. In other words, counsel for appellant contends that the doctrine of *respondeat superior* does not apply there, his contention being that such a doctrine is unknown to the Civil law.

Objection having been raised by plaintiff-in-error that the Circuit Court of Appeals erred in affirming the judgment of the trial court in overruling the demurrer to the amended complaint, let us first consider what this pleading contained. It merely alleged that the complaint did not state facts sufficient to constitute a cause of action and that the defendant especially demurred to all that part of the complaint wherein mental and physical pain and suffering was set up as an element of damages (p. 4 of the Record).

Plaintiff-in-error then goes on to state that in overruling the demurrer, the Court "thereby held that the liability of plaintiff-in-error was to be determined in accordance with rules of common law respecting liability of corporations for the acts of their agents, instead of by rules of the Civil law, which he claims were then in force and effect in the Canal Zone".

Page eight of the record shows that the trial court overruled this pleading without one word being said as to why or by virtue of what law such action was taken. It is therefore unfair to assume that the trial Court applied any particular law in this respect. Neither did the Circuit Court of Appeals in passing upon this question make any allusion as to what law was to govern with respect to this phase of the case. That Court merely stated as follows:

> "To this complaint, the defendant below interposed a demurrer on the ground that the same does not state facts sufficient to constitute a cause of action and especially to all that part of plaintiff's complaint wherein mental and physical pain and suffering are set up as an element of damages. * * *
>
> "On consideration of the record, we conclude that the demurrer to the complaint was properly overruled" (p. 39 of the Record).

It is therefore not fair to assume that the Circuit Court of Appeals did other than confine itself to the record in this respect.

A reading of the complaint and amended complaint (pp. 2-6 of the Record), will conclusively demonstrate that the complaint and amended complaint were not demurrable.

However, for the sake of argument, let us assume that the Civil law should prevail in this case, and under such circumstances are the first two assignments of error tenable. We are therefore met with the proposition as to whether or not there was any law in force and effect within the Canal Zone at the time this suit was instituted, civil or common, upon which defendant-in-error had a right to recover in a tort action against a corporation for personal injuries caused by the negligence of an employe of a corporation acting within the scope of his

authority. That is, does the doctrine of *respondeat superior* apply in the Canal Zone.

Before entering into a discussion of this last mentioned subject, we first wish to call the court's attention to a misstatement of fact appearing on pages 24 and 25 of plaintiff-in-error's brief wherein it is announced that defendant-in-error relied on an Executive Order of the President with reference to speed of automobiles in the Canal Zone in order to recover damages. This is not a fact, but an allegation was made in the complaint as to the chauffeur of the bus running same at an excessive rate of speed for the purpose of requesting the trial court to charge the jury in this respect in order to establish that there had been negligence *per se*. This that court refused to do. Plaintiff-in-error well knew that the suit was brought against it for the negligent driving of its chauffeur, and that the Executive Order referred to on page two of this brief was not the only law relied upon by the plaintiff in the trial court in support of his claim. A reading of the complaint and amended complaint (pp. 2-6 of the Record) will show this to be a fact.

The Circuit Court of Appeals in passing upon the doctrine of *respondeat superior* as applicable to the instant case (*Panama R. Co.* v. *Bosse,* 239 Fed. 303; l. c. 305) states:

> "The main contention on that ground is that the Railroad Company was not responsible for the acts of negligence of its employee resulting in injury to others.
>
> "Corporations act only through agents and every act of an authorized agent within the scope of his employment is therefore an act of the Company."

Later, the Circuit Court of Appeals in the case of *Panama R. Co.* vs. *Toppin,* 250 Fed. 989, had occasion to again consider this subject. In that case, the Court in

sustaining the doctrine of *respondeat superior* as existing in the Canal Zone states:

> "There was evidence tending to prove that the plaintiff was injured as alleged. The existence of the quoted laws of Panama was not denied by the defendant, but it was contended in its behalf that a request for a directed verdict in its favor should have been given, on the ground that neither of those laws, as it was authoritatively interpreted and enforced in Panama, had the effect of making a railroad company answerable for the negligence or misconduct of its employes while acting within the scope of their employment; and that the doctrine of *respondeat superior* is not part of the law of Panama. We are not of opinion that the evidence which was adduced as to the laws of Panama supports this contention. On the contrary, we think the evidence is such that it well supports a finding that the quoted statute of 1887, as it has been authoritatively interpreted in Colombia while Panama was a part of that country, has the effect of making railroad companies responsible for personal injuries caused by the want of care or negligence of their employes while engaged in the service they were employed to render."

Articles 640, 2341, and 2347 of the Civil Code of the Canal Zone provide as follows:

> "Art. 640. The acts of the representative of the corporation, in so far as they do not exceed the authority conferred upon him, are the acts of the corporation: when they exceed such authority, they bind the representative personally only."

> "Art. 2341. He who has committed an offense or fault resulting in injury to another is obliged to indemnify him, without prejudice to the principal penalty that the law may impose for the fault or offense committed.

> "Art. 2347. Every person is responsible, not only for his own actions, for the purpose of indemnifying the injury, but for the acts of those that are under his charge as well."

The first section above quoted seems to very plainly express the law in this respect. The manner in which the chauffeur operated the bus may have been careful or negligent, and if in the latter manner, there exists no doubt as to the liability of the corporation, which must respond in damages.

As Louisiana is about the only state in the Union whose jurisprudence is founded on the doctrines of civil law, we must naturally look to some of the decisions of the Supreme Court of that state as our guide. The Civil Code of that state also has certain provisions which are almost identical with those just quoted. That Court, in passing on this subject says:

> "But if the corporation, acting only through agents, is to be exempted from liability for its agents' acts on the theory that some preventative power must be shown, beyond the selection of the incompetent agent, it would follow that no corporation could be made liable. The theory, in other words, would seem to exempt corporations from the responsibility for the neglect and imprudence of their servants imposed by the law on all masters."
>
> *Nelson* vs. *Crescent City R. Co.*, 49 La. Ann. 491.

In support of his attempt to convince this court that the doctrine of *respondeat superior* does not apply within the Canal Zone counsel for appellant (pp. 25, 26, Plaintiff-in-Error's Brief) cites the remarkable case of *Filipe Ramirez* vs. *The Panama R. Co.*, a translation of the decision of the Supreme Court of Colombia being set forth in full in his brief. This case was decided by the Supreme Court of Colombia more than thirty years ago.

The opinion shows that the plaintiff attempted to steal a ride on a passenger train of the Panama Railroad Company. For some reason which does not appear in the record, one C. Smith, who was employed "to casually lend services" as conductor of the company, became engaged in an altercation with Ramirez in the course of which a fight ensued between these two individuals and Smith threw Ramirez off the train. As a result of the injuries received in this fight with Smith, Ramirez became permanently disabled. The Court held that Smith was guilty of a crime and that his acts were not in the course of his employment; that the suit was untimely and that it could not be instituted against Smith until he had been convicted and the defendant company was absolved from liability. We respectfully submit that the decision of the Court does not differ materially from the doctrine as laid down by all the Courts of last resort in the United States. In other words, if an employe of a company while acting outside the scope of his employment injures any person, his employer is not liable in damages for such act. But such was not a fact in the instant case.

Appellant next (pp. 30, 31, Plaintiff-in-Error's Brief) in support of this contention, cites the case of *Johnson* vs. *David,* 5 Philippine Reports, 663, in which the Supreme Court there held that the owner of a coach who was not riding in same, was not liable for any damages by one who is injured by the negligent driving of the coachman. As will later appear, the civil law with reference to the liability of empressarios and of private individuals in tort actions is not identical, although the weight of authority as indicated by the opinions of courts of last resort in countries wherein the civil law prevails is contrary to this decision of the Supreme Court of the Philippines.

Appellant next (p. 35, Plaintiff-in-Error's Brief)

cites the following from the case of *Strawbridge* vs. *Turner & Woodruff,* 8 Louisiana Reports, 538:

> "This restriction to the liability of masters and principals was an unfortunate and unadvised departure from the Napoleonic Code, from which most of the enactments of our laws on this subject have been taken almost verbatim. In that work, the restriction which exists in favor of fathers, teachers, etc., does not extend to masters or principals. The reason given for this distinction is, that servants and agents, when in the discharge of their duties, are supposed to be acting under the authority of their masters and principals; and that the latter should be attentive to employ none but good servants and agents, while the restricted liability of fathers, teachers, etc., has only for its object to secure from them a proper degree of watchfulness over the conduct of the persons entrusted to their care."

It is indeed strange appellant should cite such law in support of his contention as to the doctrine of *respondeat superior.*

Kirkbridge, the chauffeur and agent of plaintiff-in-error, naturally admitted that he was a past master in his art, and was running his bus without a speedometer (pp. 23-24 of Record), but the record does not disclose anything with reference to the diligence used by the company in selecting him; furnishing him proper appliances to work with, nor that he was acting with due care at the time of the accident, all of which facts should have been shown by affirmative proof introduced by counsel for plaintiff-in-error at the time of trial.

Why appellant should cite at length an ordinance relative to the licensing of chauffeurs in the Canal Zone in support of any issue raised by the record in this case we are at a loss to understand. This ordinance was not introduced in evidence at the time of the trial and forms

no part of the record (pp. 36-37, Plaintiff-in-Error's Brief).

The cases and argument as advanced by appellant (pp. 38-50, Plaintiff-in-Error's Brief) are too puerile to warrant serious consideration. Appellant would try to have this Court believe that if the Railroad Company by virtue of its charter had no right to operate buses as an adjunct to its business, it would then *per se* not be responsible for any injuries resulting from same (pp. 46, 47, 48, 49, Plaintiff-in-Error's Brief), that is, that such acts were *ultra vires*. The reasoning advanced by appellant in his brief on this subject semes to be in keeping with the rest of his absurd appeal to this court. Counsel for appellant should know better than to tell this Court (p. 46, Plaintiff-in-Error's Brief), that the operation of the bus in question by the Railroad Company had no connection with the railroad proper, nor that the Railroad Company did not have the right under its charter to operate same. This point being immaterial to the issues raised by the record in the instant case, requires no further comment.

On page fifty of plaintiff-in-error's brief, reference is made to the fact that defendant-in-error also relied on a decision of the Supreme Court of Bogota, rendered in the case of *Cancino* vs. *The Railroad of the North* in December, 1897. This is a misstatement of fact as the defendant-in-error never relied on this case in support of any of his contentions and would not have the effrontery to burden this or any other court with such an absurd citation of law. It is, however, a fact that the plaintiff-in-error in his brief here as well as in the Circuit Court of Appeals, relied upon this case in support of his theory opposing the doctrine of *respondeat superior*.

This was a suit brought by the plaintiff, Mrs. Jaramillo de Cancino, against one Manuel Davila, the concessionaire of a railroad, for damages resulting from the burning of plaintiff's house by reason of the escaping of

sparks from the smokestack of a locomotive which belonged to the defendant. The Court held that the defendant was liable, and condemned it to pay a trifle over four thousand pesos, the estimated value of the house and furniture therein. In that case it was proven, among other things, that the engineer, Tomas Pinzon, was "A good employe, a skillful engineer, prudent, of good disposition, gentle and careful in the discharge of his duties", and that Juan Manuel Davila, the defendant, "Was scrupulous and exacting as to the selection of employees for the enterprise." In other words, in the *Jaramillo* case, the defendant sought to relieve himself of responsibility by claiming that his engineer alone was responsible. This is exactly the defense as set up by this appellant, and the case cited clearly evinces the untenability of its position. In this connection the Supreme Court of Bogota states:

> "It is evident that the provision of the last of these articles assigns the responsibility not only for a person's own acts, but for the acts of another when these are executed by persons who are in the care or under the authority of others, in order that the latter may be responsible for the damages which the former may have caused to a third person, with the limitation and exception, however, that the responsibility of such persons ceases if by the exercise of the authority and care which their respective characters prescribe for and confer upon them they could not have prevented the act.
>
> "The Tribunal applying the disposition to the case of the suit, establishes the responsibility of the defendant as Empresario of the Railroad of the North, under whose authority the engineer of the locomotive which caused the fire was serving; and applying the rule contained in article 1604 of the Civil Code, that 'the proof of the diligence or care is incumbent on him who ought to have exercised it', the Tribunal deduces that the action having been directed not against the locomotive engi-

neer of the Railroad; but against the empresario, there is no necessity of ascertaining if there is a criminal responsibility on the part of the engineer, without for that reason pausing to consider if the civil action could have been instituted without regard to the criminal action, even before the existence of Law 169 of 1896, because it takes no notice of the existence of Law 62 of 1887, which reads as follows:

"'The empresarios of Railroads will be resonsible for the damages and injuries which they may cause to persons and property by reason of the services of said roads and which may be imputable to carelessness, neglect, or violation of the police regulations which will be issued by the Government as soon as the present law is promulgated.'

"In spite of the provisions of this law, it is contended by the attorney of Davila, that the engineer of the railroad company would not be considered as his dependent or subordinate (dependiente), but solely as his employe (empleado) and that for that reason he does not have to respond for the act which is being inquired into; *but in the opinion of the Tribunal if it is true that in order that the responsibility of which the Civil Code treats may exist, there ought at the same time to be a dependence (dependencia) between the empresario and the agent of the act. It is no less true that this dependence may be recognized as a matter of law, nor is it necessary that the dependence be absolute: It suffices if the act be executed by reason of the service entrusted to the individual who serves under the empresario, for in all the functions with which he is charged he preserves the character of a dependent (dependiente) of the empresario* (pp. 136, 137, 138, Plaintiff-in-Error's Brief). (Italics ours.)

In other words, the case cited and apparently relied upon by plaintiff-in-error discloses that a judgment was rendered in damages against the defendant company for

the negligence of an employe of the company, in the sum of four thousand four hundred and two pesos ($4,402.00), together with the costs of suit. How this case tends in any way to support the contention of plaintiff-in-error is a matter of the deepest mystery.

In conclusion of the first assignment of error (pp. 55-60, Plaintiff-in-Error's Brief), appellant states that, "decisions of the Courts of the various states of the Union may be found announcing principles somewhat similar to those involved in the Colombian and Panamanian cases cited in his brief", and then refers to the case of *Isaac* vs. *Third Avenue R. R. Co.,* 47 N. Y. page 122. Why plaintiff-in-error should burden this court with a citation of this character which is manifestly not in support of any contention raised in his brief, and especially in view of the fact that he has said we cannot go beyond the authorities of the civil law in order to determine this cause, we cannot understand. Even the doctrine as laid down in that case has been overruled in the case of *Stewart* vs. *Brooklyn & Crosstown R. Co.,* 90 N. Y. 588.

Under the Civil Law, the Employer is Liable for the Negligence of His Employe when the Latter is Acting within the Scope of His Employment.

As counsel for plaintiff-in-error seems to have wandered all over the universe in his attempt to find some law to support his first assignment of error, it behooves us to advise this court as to the law on this subject in the following jurisdictions based upon principles of the civil or Roman law.

> "Civil actions for the recovery of damages for injuries to persons and property caused by the fault or negligence of another have been recognized both by the Roman and the civil law."
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> *4 Ganel & Sanches, Codico Civil Espanol,* 894;
>
> *6 Toullier, Le Droit Civil Francais,* 94.

THE PHILIPPINES:

> "It is contended by the defendant, as its first defense to the action, that the necessary conclusion from these collated laws is that the remedy for injuries through negligence lies only in a criminal action in which the official criminally responsible must be made primarily liable, and his employer held only subsidiary to him. According to this theory the plaintiff should have procured the arrest of the representative of the company accountable for not repairing the track, and on his prosecution a suitable fine should have been imposed, payable primarily by him and secondarily by his employer.
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> "*This reasoning misconceives the plan of the Spanish Code on this subject.* Article 1093 of the Civil Code makes obligations arising from faults or negligence not punished by law, subject to the provisions of chapter two of title sixteen. Section 1902 of that Chapter reads:
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> > "A person who by an act or omission causes damage to another when there is fault or negligence, shall be obliged to repair the damage as done." *Idem.* (Italics ours.)
>
> *Rakes* vs. *A. G. & P. Co.,* 7 Philippines, 359.

In the case of *Dampfschieffs Rhederie Union* vs. *La Compagnia Transatlantica,* 8 Phil. 766, where the captain of a ship negligently ran into and damaged another, the company that owned the ship causing the damage was held liable.

PORTO RICO:

In *Venturo Munich* vs. *Ramon Valdez,* 3 Porto Rico Fed. Rep. 251, it was held that the defendant, the owner of a railroad, was liable in damages for the negligence of the employes of the railroad company which caused injury to a passenger.

In *Maria Play Hernandez* vs. *San Juan Light & Tran-*

sit Co., 3 Porto Rico Fed. Rep. 138, it was decided that the plaintiff, who was injured as a result of the collision of a trolley car of the defendant company with the automobile in which he was riding, could recover damages against the company.

In *Morales* vs. *San Juan Light & Transit Company,* 4 Porto Rico Fed. Rep. 361, the defendant company was held liable in damages to the plaintiff, a collision having occurred between the carriage in which plaintiff was riding and a car of the company, the employes of defendant being negligent.

In the case of *Garcia* vs. *Gorgetti et al.,* 4 Porto Rico Fed. Rep. 495, the defendant was held liable for the negligence of his chauffeur in running into plaintiff.

In *Gonzalez* vs. *San Juan Light & Transit Company,* 5 Porto Rico Fed. Rep. 602, it was held that a person injured through the negligence of employes of a street railway company by the starting of a car before plaintiff had been given sufficient time to alight, was entitled to recover against the company.

LOUISIANA:

> "The civil code of this state enunciates the rule of *respondeat superior* in *terms which exactly correspond to the rule of the common as well as of the civil law. Masters and employers are answerable for damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."* (Italics ours.)
>
> *Williams* vs. *The Pullman Palace Car Company,* 40 La. Ann. 87.

In *Black* vs. *Rock Island A. and L. R. R. Co. et al.,* 125 La. 102, the Court said:

> "This Court has said, however, in a case on which defendants seem to rely, that the earlier doctrine that in general a master is liable for the fault or negligence of the servant, but not for the

wilful wrong or trespass, has been greatly modified in modern jurisprudence, which places the test of the master's liability, not in the motive of the servant or the character of the wrong, but in the injury, whether the act done was something which his employment contemplated and which, if properly and rightfully done, would have been within the scope of his functions. * * *

A railroad corporation, being incorporeal and incapable of acting save through agents selected by it, when it places in the custody and under the control of certain agents so selected, its depot, locomotives and tracks, and vests in them the authority to operate the locomotives over the tracks, with a certain discretion and subject to certain instructions, but with the actual power to operate them when they please, must be regarded as represented by such agents, within the sphere of authority conferred upon them, and should be held liable to the third person, injured through the negligence or improper use or abuse of the power and discretion vested in such agents." * * *

We do not deem it necessary to cite further decisions of the Supreme Court of Louisiana. They are unanimous in upholding the doctrine that the master is liable for the acts of his servant when the latter is acting within the scope of his employment.

THE CANAL ZONE:

With reference to this same contention, in the case of *Fitzpatrick* vs. *The Panama Railroad Company,* 2 Canal Zone Supreme Court Reports, 112, l. c., 128, the Court said:

> "Therefore, a careful review of the decisions of the Supreme Court of Panama and Colombia, the Courts of the Philippines and Porto Rico, and particularly of the Supreme Court of Louisiana, lead to the conclusion that, at least so far as the empresarios of railroads are concerned, they must,

> within the Canal Zone, be held liable for the negligent acts of their servants, agents, and employes, by the adoption of the rule of *respondeat superior* as that rule is understood and applied in the States of the Union. Viewed, therefore, both from the standpoint of the provisions of the Civil Code as applicable here, and also from the standpoint of the general rules of negligence under the common law, we hold that the defendant company was liable for the admittedly negligent acts of its agent in causing the injury to Fitzpatrick." (Italics ours.)

From the foregoing citations, it is apparent that the doctrine of *respondeat superior* is followed in countries whose jurisprudence is founded on civil as well as common law.

In reply to plaintiff-in-error's second assignment we respectfully submit that there is nothing whatsoever in the record to substantiate the theory of an intervening cause, that is, the boy on the bicycle being either directly or indirectly responsible for defendant-in-error's injuries. In this connection, we respectfully invite the Court's attention to a reading of pages 17, 28, 29 of the record.

Reply to Third Assignment of Error.

Damages for Physical Pain and Suffering are Recoverable In a Tort Action in the Canal Zone.

Plaintiff-in-error in this last assignment asserts that no claim for damages can be allowed in a tort action by way of mental and physical pain and suffering, and that the Court erred when instructing the jury to the effect that it had a right to consider same in assessing damages.

The Circuit Court of Appeals in disposing of this assignment, states:

> "Under the jurisprudence of the Canal Zone, we think a proper interpretation of sections 2341 and 2356, damages for physical pain and suffering are recoverable" (p. 40 of the Record).

The two sections of the Code last referred to, read as follows:

> "Art. 2341. He who has committed an offense or fault resulting in injury to another is obliged to indemnify him, without prejudice to the principal penalty that the law may impose for the fault or offense committed."
>
> "Art. 2356. As a general rule, every injury imputed to malice or negligence, of another person, shall be repaired by the latter."

Later the Circuit Court of Appeals again had occasion to pass upon this identical question. However, at the subsequent hearing, two Circuit Court of Appeal judges, other than those who heard the instant case, were on the bench. In this case, it was stated:

> "Under the law in force in Panama and in the Canal Zone, damages for physical pain and suffering are recoverable in such an action as the instant one. *Panama R. Co.* vs. *Bosse*, 239 Fed. 303, 152 C. C. A. 291. A ruling of the court to this effect, which was assigned as error, was in conformity with the decision just cited, and was not erroneous."
>
> *Panama R. Co.* vs. *Toppin*, 250 Fed. 989.

From the above it would seem that this question has already been considered by no less than five different justices of an Appellate Court wherein interpretations of the civil law are frequent.

Appellant would try to have this Court believe (p. 63, Brief of Plaintiff-in-Error), that neither the trial court nor the Circuit Court of Appeals, considered articles 1613 and 1614 of the Civil Code when disposing of this issue.

Manifestly, such is not the case, for the trial court as well as the Circuit Court of Appeals was well aware of these sections of the Code, for appellant in his brief in the Circuit Court of Appeals laid great stress on same.

Let us first refer to one of the cases cited by appellant in support of the contention that even under the Colombian law, damages for pain and suffering can be awarded. Even though the statement was merely obiter, on page 95 of plaintiff-in-error's brief, in the appendix thereto, in the case of *Felipe Ramirez* vs. *The Panama R. Co.* is found the following:

> "The sum of sixty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, would not compensate, even in a small degree the physical and mental sufferings of the injured party. His misfortune is lamentable, for, though it may not be permanent, as may be deduced from the prognosis of the physican, Dr. Jorge E. Delgado, there are mental sufferings, which though not tangible, yet we can all appreciate, principally when they do not affect us personally."

This language of the Supreme Court of Colombia, certainly indicates that physical and mental pain and suffering would be considered by that tribunal as an element of damage, and the only reason why judgment was not rendered against the Panama Railroad Company in that case was, as has heretofore been shown, simply because the plaintiff in that action was injured in a fight with C. Smith, who "casually lent his services to the company", and whose action in injuring the plaintiff was not within the scope of his employment.

To call the attention of this Court to what the Supreme Court of the Republic of Panama may or may not have done in certain cases, and ask it to be guided accordingly is too absurd for serious thought. Hence, we shall not burden this Court by replying to such portions of plaintiff-in-error's brief.

The codes of Louisiana, Porto Rico, the Philippines

and the Canal Zone are practically identical with reference to actions of this nature. By the great weight of authority, in jurisdictions under American control wherein civil law prevails, damages can be awarded for pain and suffering, and the Philippine case cited by plaintiff-in-error is the only one that might be found to the contrary.

PORTO RICO:

> "In cases of personal injury by a railroad accident, under the damage act, 1803 and 1804 of the Civil Code of Porto Rico of 1902, where there is no malice in or about the occurrence, compensatory damages are all that can be recovered, and the measure of the same is the extent of the injury done and its character, whether permanent or temporary, *the amount of suffering he endured or may have to endure during life,* if it is permanent, and the effect it has upon his earning capacity, the amount of time lost by reason thereof, and the cost of the sickness for physicians, drugs, medicines, and surgical treatment, if any." (Italics ours.)
>
> *Martinez* vs. *Am. Ry. Co.,* 5 Porto Rico Fed. Rep. 311.

Section 1803 of the Civil Code of Porto Rico referred to in the decision is identical with the section of the Civil Code of the Canal Zone. It reads as follows:

> "A person who, by an act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done."
>
> "In estimating damages for personal injury, *the jury may consider pain and suffering,* medical attendance, loss of time, past, present and future, and of salary." (Italics ours.)
>
> *Wood* vs. *Valdez,* 4 Porto Rico Fed. Rep. 165.

"In estimating damages the jury may consider the extent of the injuries, expectancy of injured child's life, *suffering he may have to endure through life,* physically and mentally, and his impaired ability to earn a living." (Italics ours.)

Garcia vs. *Ponce Ry. and Light Co.,* 4 Porto Rico Fed. Rep. 4.

"In estimating damages the jury may consider plaintiff's age, earning capacity and loss thereof, medicines, medical attendance, *suffering, future expenses, probable duration of injuries and suffering* and loss of earnings." (Italics ours.)

Guzman vs. *Herencia,* 4 Porto Rico Fed. Rep. 105; Affirmed in 55 Law. Ed. U. S. Rep. 81.

LOUISIANA:

"The jury allowed plaintiff $1,000. We *fix the damages for suffering and permanent injuries at* $3,000, which with the $1,799.69 of actual expenses, makes an aggregate of $4,799.69, for which the plaintiff is entitled to judgment." (Italics ours.)

Hanna vs. *New Orleans Ry. and Light Co.,* 126 La. 634; l. c. 638.

"The verdict is perhaps somewhat large, but we could assign no positive reason for reducing it. The injuries are of the gravest character and are permanent; and, *besides, the sufferings have been very great, and plaintiff is destined to continue to suffer."* (Italics ours.)

Lee vs. *Powell Brothers and Sanders Co.,* 126 La. 51; l. c. 59.

"According to the evidence she will hereafter require, not only some one to wait upon her constantly, but she will never be able to dispense with

the services of a physician, which element considered, *and also the mental anguish and physical pain which she has endured, and is to endure, we are of the opinion that, though there can be no such thing as adequate compensation, the amount awarded by the District Court should be increased.*" (Italics ours.)

Egbert vs. *New Orleans Ry. and Light Co.*, 128 La. 474; l. c. 486.

It would be futile to cite further Louisiana authorities. In this regard, they are unanimous in holding that damages can be recovered for pain and suffering. There is no decision to the contrary, even by inference.

CANAL ZONE:

This same question was raised by the same counsel for the same plaintiff-in-error before the Supreme Court of the Canal Zone in the case of *Fitzpatrick* vs. *The Panama Railroad Company* and in the case of *Toppin* vs. *The Panama R. Co.* The same cases were cited in the brief in the Fitzpatrick case by appellant as are cited here by plaintiff-in-error. In the Fitzpatrick case with reference to the claim of the Panama Railroad Company that damages for physical pain and suffering could not be allowed, the Court said:

"It may be said that the codes of Louisiana, Porto Rico, the Philippines, and the Canal Zone, are practically identical in this respect, and, *if it were necessary to look beyond the decision of this court in the case of Reese* vs. *Shay, we find abundant authority in Porto Rico and Louisiana in support of the appellee's contention that damages for pain and suffering were properly awarded by the Court below.* In *Martinez* vs. *Am. Ry. Co.*, 5 Porto Rico Fed. Rep. 311, the Court said:

'Where there is no malice in or about the occurrence, compensatory damages are all that

can be recovered, and the measure of the same is the extent of the injury done and its character, whether permanent or temporary, the amount of suffering he endured or may have to endure during life.'

In the cases of *Wood* vs. *Valdez,* 4 Porto Rico Fed. Rep. 165; *Garcia* vs. *Ponce Railway and Light Co.,* 4 Porto Rico Fed. Rep. 4, and *Guzman* vs. *Herencia,* 4 Porto Rico Fed. Rep. 105, the juries in each case were instructed by the Court that they could take into consideration, in estimating the damages for personal injury, the pain and suffering of the injured party. The Louisiana Courts have similarly decided in a number of cases of which the following may be simply referred to: *Hanna* vs. *New Orleans Railway and Light Co.,* 126 La. 634; *Lee* vs. *Powell,* 126 La. 51; *Egbert* vs. *New Orleans Railway and Light Co.,* 128 La. 474.

In fact we can see no ground of error arising out of the question of damages awarded." (Italics ours.)

Fitzpatrick vs. *The Panama R. Co.,* page 3, Vol. 2, Supreme Court Reports Canal Zone, l. c. 129-130.

Again the Supreme Court of the Canal Zone in passing upon this subject had occasion to state:

"Moreover, it must be said that the plaintiff was undoubtedly entitled to recover for *pain and suffering:* and the loss of an eye under the circumstances detailed in the evidence at the trial below must certainly have caused the most excruciating *pain and suffering, mental* and *physical.* Under all the circumstances we are compelled to say that we do consider the sum of $500.00 to be wholly inadequate, especially when we consider the youth of the plaintiff, who was but 24 or 25 years of age, and who must go through life per-

manently disfigured and with every reasonable human presumption of a permanent diminution of earning capacity."

McKenzie vs. *McClintic-Marshall Const. Co.*, page 181, Vol. 2, Supreme Court Reports Canal Zone, l. c. 181-182-183.

It is apparent the objection urged by plaintiff-in-error under this assignment, does not merit serious consideration. Defendant-in-error respectfully insists that the opinion of the Circuit Court of Appeals be sustained.

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